THE CONVEYANCER AND PROPERTY LAWYER

VOL. 15, NO. 2. MARCH—APRIL, 1951

CONVEYANCER'S NOTEBOOK

Trading with the Enemy.—A new Statutory Instrument with regard to "enemy property" has been issued; Trading with the Enemy (Custodian) Order, 1951 (SI 153/1951). It applies to an "enemy", that is, the German State, any individual resident in Germany, any body of persons incorporated under the laws of Germany, any body of persons carrying on business if and so long as the body is controlled by the German State or an individual or body corporate as aforesaid, and any individual or body of persons (corporate or unincorporate) carrying on any business in Germany as respects that business: cl. 10 (*c*). It vests in the Custodian of Enemy Property any beneficial interest of any "enemy" or "enemy subject" in any property belonging to an enemy or being property existing by virtue of "any will, settlement, trust, intestacy or any contract or agreement whatsoever": cl. 1 (*a*). But it particularly applies to moneys and dividends and interest or money payable on redemption of securities: see cl. 1 (*b*).

It does not apply (*inter alia*) to any estate or interest in land; any property which at any time after February 2, 1948, has come into the ownership of "any individual who, not being either a British subject or a British protected person, possesses German nationality and is resident in Bulgaria, Hungary, Roumania or Italy, any right or interest the vesting of which in the Custodian would cause forfeiture or determination of such interest": cl. 2 (*a*) (*c*) (*e*). It also does not apply to any property which has come into the hands of any person by authorised trade and trade is already authorised.

Any disposition of any property affected by the Order requires the consent of the Board of Trade: cl. 7 (*b*).

The Order is generally concerned with the powers of the Custodian to recover the money, transfer property and give receipts. In fact it must be consulted in detail wherever property affected is concerned.

Legacies to Hospitals—National Health Service Act.—Not only have there been a number of decisions on the effect of the Act on legacies (and see *post*, Notes of Cases on Charities), but so far the Ministry have been successful in obtaining the legacies for the nationalised medical service. This is particularly noteworthy in *Re Bland-Sutton's Will Trusts* (*post*, p. 118) where the testator had set out to prevent precisely this course.

Bearing in mind that the Hospital Boards clearly intend to rationalise the organisation of the hospitals without too much regard for local feeling and also that personal association with any such legacies is likely to be small (see *Re Ginger*, *post*, p. 118) we cannot avoid the thought that the trend of the decisions would probably not commend itself to the testators could they speak for themselves. With respect we consider that the aims of the hospital organisation and the character of its administration make the new hospital substantially different from the old even where the same general activities are carried on in the same building. Such a hospital may not be sufficiently different in law to cause lapse, but many testators might consider it so. As these are not the sort of cases that get into the press, testators, who have made substantial gifts to hospital charities before the Act came into force, might be grateful to have their attention drawn to the position.

There is also a more general question that these decisions affect. They emphasise the continuance of certain physical activities (see *Re Ginger* (*supra*), *Re Bland-Sutton* (*supra*), and *Re Myers* (*post*, p. 119)) rather than the continuance of particular bodies or particular objects. This may be important in cases of lapse in many instances, not all of them within the range of charity. It has so far been assumed rather than seriously argued that the new hospitals are charities. Assuming this to be the case we think that the grounds on which they can be held to be charitable differ from those which seem originally to have been responsible for hospitals falling within that category, namely, the relief of poverty. This too may, when rationalised, have some interesting repercussions on the general law.

Vendor's costs under section 82.—Mr. Wisdom's interesting note at p. 4 of the current number of *The Conveyancer* has reminded me of the somewhat unexpected result of a strict construction of section 125 of the Local Government Act, 1933, the section which is commonly used by a local authority when it acquires existing buildings for offices. Section 176 of the same Act, which incorporates the provisions of the 1845 Act for purchases by agreement, applies only to purchases under Part VII of the Act, and it does not seem that there is any express incorporation of the 1845 Act applicable to such a case. Apart therefore, from the terms of any contract, an acquiring authority would not seem to be liable to pay the vendor's solicitors' costs in any such case.

J. F. G.

"KNOW-HOW" AGREEMENTS

We print at p. 89 an article on the above subject. We have asked Mr. Blanco White to write this article as a result of a reference which was made to the subject in the journal *Scope*, of which we append an extract :—

> "A short time ago I drew up a know-how agreement with a South African company who wanted to go into a new industry and were prepared to buy all the equipment in this country and, in addition, to pay a handsome royalty and an amount of equity for the know-how and for training facilities for technicians. My customer submitted the agreement to his London solicitor and a meeting took place. The solicitor searched in his text-books for information on 'know-how agreements' and, failing to find anything on the subject, advised his client not to enter into such a frivolous agreement. The result was that the agreement was concluded without the help of the solicitor. But it might have proved fatal to a mutually profitable business and I am afraid that this is what is actually happening in many cases."
>
> One is reluctant to believe that the law, well known to be an ass, is now beginning to cultivate the attributes of an ostrich. But if it is the essence of the know-how agreement that the lawyers cannot bear to contemplate, it can only be because their heads are buried in the sand of pre-war precedents. If, on the other hand, it is the word itself that is too repulsive to be recognised, the sooner the legal lexicographers invent a respectable sesquipedalian synonym for it, the better it will be for "all whom it may concern".

Our readers will probably share our dislike of the term "know-how", but we ourselves have not been able to think of any alternative which conveys the same sense. We have therefore retained the term, and can only apologise to those of our readers who have any strong feelings about it.

THE PUBLIC UTILITIES STREET WORKS ACT, 1950

By J. F. Garner, LL.M., Solicitor

This new statute, which will not be fully in operation until April 26, 1951, is but one more example of a modern Act of Parliament having oblique, but none the less important, effects on the law and practice of conveyancing. The private practitioner of today can but rarely afford to ignore the more important developments in public and local government law, and it is therefore the intention of this note to attempt to estimate the conveyancing effect of the new statute.

Briefly, the intention of the Act is to provide two uniform codes of procedure, regulating the relations of statutory undertakers and highway authorities and other interested bodies with regard to the execution of street works, and to endeavour to limit the number of occasions on which it is necessary to open up the surface of a street. The provisions of these two codes, the one regulating the procedure where the road authority is carrying out major repairs to a street, and the other regulating the execution of undertakers' works in a street, are more than usually complicated, being exceptionally rich in special definitions and cross-references, but for such matters we would refer our readers to the local government and engineering journals, all of which have dealt with the statute to some extent in recent months. Here we are concerned with the points that will be of interest to the conveyancer and his client, the private landowner. These may be considered under two main headings.

(a) *Private Streets.*

The statute makes many references to the "managers" of a private street—an expression which does not seem to have appeared in previous legislation. By this term is meant (s. 2 (5)):

> "(a) if there is an authority, body or person liable to the public to maintain or repair the street, that authority, body or person; or
>
> (b) if there is no authority, body or person so liable, any authority, body or person having the management or control of the street".

As the expression can be used only in relation to a private street (*i.e.*, a street that is not maintainable by the inhabitants

at large), normally the "managers" will be the sum total of the frontagers to the street—an unorganised body, and persons who often find difficulty in reaching agreement on such matters. Where the managers can be organised, however, the new Act for the first time provides a procedure whereby they may be able to insist on statutory undertakers carrying out major works in the street to their reasonable satisfaction, and also to ensure (with certain exceptions) that the works of reinstatement and making good are properly executed.

In certain circumstances the local highway authority may be able to operate these provisions of the Act—even in respect of a private street—for under the Second Schedule, they may declare the street to be a "prospectively maintainable highway", and they will then become the "street authority" in respect thereof. Such a declaration may be made in respect of any street (a term which is widely defined in the Act, and includes "any length of land laid out as a way whether it is for the time being formed as a way or not, irrespective of whether the highway, road or other thing in question is a thoroughfare or not": see s. 1 (3)) as to which the authority are satisfied "that it is likely to become a maintainable highway". It seems probable that most local authorities will, once the Act is fully in operation, make such declarations in respect of most private streets that are fully developed in their area. Generally speaking, except as an indication that the frontagers may expect the Private Street Works Act, 1892 (or the corresponding provisions of the Public Health Act, 1875, or of relevant local legislation) to be put in operation in respect of the street at an early date, the making of such a declaration will be to their advantage rather than the reverse. In any event, it is obviously a matter which would be of interest to an intending purchaser of property fronting in the street. It is provided, therefore, in the Second Schedule to the Act, that declarations must be registered in the appropriate local land charges register, and by virtue of the Public Utilities Street Works Act, 1950 (Registration of Declarations) Rules, 1951 (SI 1951, No. 69), the entry is to be made in Part IV of the register. It is not, however, provided that such declarations shall *be* local land charges, and it does not seem, therefore, that a failure to register any particular declaration will affect its enforceability (if indeed, a declaration can be said to be so "enforceable" at all) against a subsequent purchaser for money of a legal estate in land affected thereby (see section 15 (1) of the Land Charges Act, 1925).

(b) *Controlled Land.*

One of the minor objects—from the administrator's point of view—of the present legislation was to enable local highway authorities to require undertakers' street works to be executed in land adjoining the street, instead of in the street itself. From the point of view of the conveyancer, this is, of course, of vital importance, for the local authority may give an authorisation for the execution of undertakers' works in any "controlled land", *i.e.*, land not containing any building, structure or erection (other than "fences, fence-walls, gates, posts, hoardings or other similar structures or erections"), which abuts on a street which is a highway repairable by the inhabitants at large, or is a "prospectively maintainable highway" (see above), and which either :

(a) belongs to the street authority for road purposes, *or*

(b) is the subject of a subsisting authorisation of compulsory acquisition by the street authority, *or*

(c) lies between the boundary of the street and an improvement line prescribed under section 33 of the Public Health Act, 1925.

The third case is the one which will be of most practical interest, and it seems that an intending purchaser's advisers should include in the customary inquiries of the local authority, prior to contract if possible, an inquiry as to whether any authorisation under the First Schedule to the Act has been given, or is in contemplation. Such an inquiry should be directed to the street authority (*i.e.*, normally, the highway authority, or, in the case of a prospectively maintainable highway, the borough or urban district council, or the county council in the case of land situate within a rural district); as practitioners will not normally be aware of the legal status of a particular road, it is suggested that this inquiry should be made of both the district council and the county council (except in the case of county boroughs, when inquiries are addressed to the county borough council alone).

The authorisation has to be given in due form, in accordance with a procedure the details of which are similar to that applicable to the making of a compulsory purchase order. The intention to give the authorisation must be advertised in a local newspaper, and notice thereof must be served on every owner, lessee or occupier of the controlled land or of any part thereof, having the interest of a tenant for a year or from year to year. There is no provision for confirmation of the authorisation by any government department, however, as in the case of a compulsory purchase order, nor can there be any public (or private) local inquiry. The notice

may be given at any time before the authorisation is to take effect, but presumably should be reasonable in point of time; in any case, however, the power of the authority to give the authorisation, or the validity of the authorisation when given, cannot be questioned in any proceedings commenced later than one month after the giving of the notice.

The effect of a valid authorisation having been given in respect of particular controlled land will be to authorise the undertakers concerned to execute specified undertakers' works in that land instead of in the street itself, and the landowner will not be able to use his land in any manner which would injure or damage any apparatus so placed in his land. If the works in question are the construction of a public sewer under the provisions of the Public Health Act, 1936 (and "statutory undertakers" for the purpose of the Act of 1950, includes a local sewer authority), the landowner will not be able to build over the sewer without the consent of the sewer authority (see section 25 of the Public Health Act, 1925), and a similar restriction will normally apply to water mains (see, *e.g.*, section 119 of the Public Health Act, 1936, applying the sewer provisions of the Act to water undertakings in certain circumstances). If a particular parcel of land ceases subsequently to fall within the statutory definition of "controlled land", the owner can require the undertakers concerned to remove their apparatus therefrom (see First Schedule, para. 8).

Compensation is payable by the street authority in respect of:

> "(a) any diminution of the value of an interest in controlled land, or in land adjacent thereto and held therewith, by the giving of an authorisation under this Schedule; or
>
> (b) any damage sustained by the owner of such an interest or of things in the controlled land which is caused by the execution lawfully of works therein, or by entry thereon, by virtue of such an authorisation".

In any case of dispute as to the liability to pay compensation under this paragraph, or as to the amount of such compensation payable, the question is to be determined by the Lands Tribunal. Unless the land is "dead-ripe", or is entitled to one or other of the extra-statutory concessions of the Central Land Board, it is not clear whether any claim at all could be made out under head (a) above, in respect of land for which permission for development has not been obtained under the Town and Country Planning Act, 1947. It will be exceptional indeed for the "existing use value" to be materially affected in any normal case, by the giving of an authorisation under the present provisions.

THE ALLOTMENTS ACT, 1950

By J. Muir Watt, M.A., Barrister-at-Law

The food shortages of two wars and the continued high prices of vegetables and fruit have fostered the growth of the allotments movement in this country, although the number of allotments has fallen in the last few years from the war-time peak of 1,400,000 in 1943. This movement has led to the enactment of a code of legislation which is not without interest to lawyers. The latest Act, the Allotments Act, 1950, introduces no fundamental changes but it extends the protection given to tenants by the earlier legislation and deals with a number of specific matters which needed attention. It contains in section 12 one provision which is not confined to allotments and is, indeed, liable to escape notice in an Allotments Act. This section, which will give permanent legislative effect to most of Defence Regulation 62B, nullifies contractual restrictions on keeping hens and rabbits and should be carefully noted by practitioners. It illustrates the tendency, which is very marked in recent agricultural legislation generally, for the needs of the nation's food production to override private contractual arrangements. It is discussed later in this article.

It is not proposed to go over the ground of the previous allotments legislation or to refer to it save in so far as it is necessary to understand the present Act. In particular, this article is concerned mainly with the impact of the statutory provisions upon the parties to a contract of tenancy, the aspect which is of interest to the property lawyer or conveyancer, and not with the duties of local authorities to provide allotments, their powers to acquire land for this purpose or their administrative arrangements.

The Allotments Act, 1950, was passed on October 26, 1950, and except for section 12 (as to which see below) came into force on that day. It extends to England and Wales but not to Scotland or Northern Ireland.

Previous Allotments Legislation and the Report of the Allotments Advisory Committee

The principal Act is still the Smallholdings and Allotments Act, 1908, Part II of which, dealing with allotments, is in the main still operative. Part I, which dealt with smallholdings, has been superseded by Part IV of the Agriculture Act, 1947. A considerable portion of the Land Settlement (Facilities) Act, 1919, which

amended the 1908 Act in certain respects, and contained some new provisions, remains standing. The Allotments Act, 1922, and the Allotments Act, 1925, are amended in parts by the present Act, but are not superseded. Further, it is still necessary to look at some of the provisions of the Agricultural Land (Utilisation) Act, 1931, in relation to allotments, but these provisions are likely to concern local authorities more than private practitioners. The private practitioner will in future find most of the law he needs in relation to allotments in the 1908 Act, as amended by the 1919 Act, and in the Acts of 1922, 1925 and 1950. He will, however, have to bear in mind also the two major statutes, whose repercussions are felt throughout the whole of modern landowning, and land-holding, the Agriculture Act, 1947 (re-enacted for the most part, except as to smallholdings, in the Agricultural Holdings Act, 1948) and the Town and Country Planning Act, 1947.

The Allotments Act, 1950, gives effect to some of the recommendations of the Report of the Allotments Advisory Committee, dated July 29, 1949, and published in 1950 (H.M. Stationery Office, price 6d.). Lawyers who wish to study the Act in detail will find the Report helpful in explaining the reasons for the amendments contained in the Act. The Act does not, however, give effect to all the Report's recommendations.

Importance of Distinction between "Allotments" and "Allotment Gardens"

It should be made clear that the ordinary type of allotment of about 10 rods or thereabouts, upon which vegetables are grown for the family's consumption, is actually an "allotment garden". This is the plot of ground upon which fathers of families are seen at week-ends carrying out operations calculated to reduce their waist-lines and save their pockets. The Allotments Act, 1950, is mainly concerned with this type of allotment. It is defined in section 22 (1) of the Allotments Act, 1922, as follows:—

> "The expression 'allotment garden' means an allotment not exceeding forty poles in extent which is wholly or mainly cultivated by the occupier for the production of vegetable or fruit crops for consumption by himself or his family."

A definition in exactly the same words is given in section 109 (3) of the Agriculture Act, 1947. The definition of an allotment, as distinct from an allotment garden, is wider. It is defined in section 3 (7) of the Allotments Act, 1922, as meaning, for the purposes of that (compensation) section, "any parcel of land, whether attached to a cottage or not, of more than *two* acres in extent, held by a tenant under a landlord and cultivated as a farm or a garden,

or partly as a garden and partly as a farm". For the purposes of the Allotments Act, 1925, it is defined as meaning "an allotment garden as defined by the Allotments Act, 1922, or any parcel of land not more than *five* acres in extent cultivated or intended to be cultivated as a garden or a farm, or partly as a garden and partly as a farm".

The difference between an allotment and an allotment garden is important from the point of view of the rights of tenants in regard to notices to quit and compensation. As an allotment garden is, by definition, something which is not used for a trade or business, it cannot in any circumstances be an agricultural holding: section 109 of the Agriculture Act, 1947, and sections 1 and 94 of the Agricultural Holdings Act, 1948. An allotment, however, *may* be an agricultural holding, with the result that the special protection of the tenants of agricultural holdings in relation to security of tenure, conferred by section 24 of the Agricultural Holdings Act, 1948, will apply, together with the special code of compensation laid down by that Act. An allotment may not, however, be an agricultural holding, since it may not fulfil the two essential requirements of (a) being used for "agriculture" as defined in the 1948 Act, (b) being so used for the purposes of trade or business.

Allotment gardens, are, therefore, designed to grow produce for home consumption, as distinguished from produce to sell by way of trade. Can the occupier of an allotment garden keep small livestock, such as poultry, rabbits or bees? The definition says that an allotment garden must be cultivated "wholly or mainly" for the production of vegetable or fruit crops. The occupier may then keep such livestock but they must occupy only a minor portion of the plot. He could not turn the whole plot into a poultry run or an apiary without transforming it into something other than an allotment garden.

For most purposes allotment gardens do not include cottage holdings: see section 3 (1) of the 1922 Act and section 6 of the 1950 Act.

The Town and Country Planning Act, 1947, and Allotments

The 1950 Act does not give effect to a recommendation of the Allotments Advisory Committee that the provisions of section 3 of the Allotments Act, 1925, which gave specific protection to the needs of allotment holders under town planning legislation, should be re-enacted. This provision required planning authorities to consult allotment authorities about the reservation of land for

allotments and give a certificate that this requirement had been observed. This protection was originally given in relation to schemes under the Town and Country Planning Act, 1925, and its effect was preserved by the Town and Country Planning Act, 1932, but not by the Town and Country Planning Act, 1947. Consequently, section 3 of the Allotments Act, 1925, is now inoperative. There is no mention of allotments as such in the Town and Country Planning (Development Plans) Regulations, 1948, although there is a reference to open spaces, and all that is now left of the specific protection previously given to allotments is the reference to them in the Ministry of Town and Country Planning Circular No. 59. One sympathises with the feeling of the National Allotments and Gardens Society, endorsed by the Allotments Advisory Committee, that greater safeguards would have been desirable, on the lines of the 1925 legislation.

PRESENT POSITION IN REGARD TO EMERGENCY POWERS

The war-time powers, which enabled the Government greatly to extend the allotment movement, are still in force, although official policy is now to restore requisitioned land to its proper owners. These emergency powers are Defence Regulation 51, which enabled land to be requisitioned for food production, the Cultivation of Lands (Allotments) Orders of 1939 and 1941 (S. R. & O., 1939, No. 1316 and 1941, No. 1431), which delegated the requisitioning powers to local authorities, and Defence Regulation 62A, which enabled any local authority to adapt land in its own occupation for use as allotment gardens and to let it either directly to tenants or to an allotment society. Defence Regulation 61, which deals with trespass on allotments, and Defence Regulation 62AA, which deals with liability for dogs straying on allotments, may also be mentioned. As a result of the Supplies and Services (Continuance) Order, 1950 (SI 1950, No. 1769) all these Defence Regulations are preserved until December 10, 1951, by reason of the continuance in force of the Supplies and Services (Transitional Powers) Act, 1945, until that date.

A local authority which has requisitioned land for allotments may make arrangements with a society or an individual for the use and cultivation of the land, but it cannot, of course, make contracts of tenancy since it has not itself any legal estate in the land. The Cultivation of Lands (Allotments) Order, 1939, however, enables the occupier to be given a measure of protection analogous to that which the Allotments Acts have given to tenants and such an occupier will be able to reap the benefit of the extended provisions

for compensation resulting from section 2 of the 1950 Act, if the document embodying the arrangement with him is appropriately worded (1950 Act, s. 6). From a legal point of view it is necessary to distinguish between allotments owned by local authorities, which they have let to tenants under the provisions of the permanent allotments legislation, and allotment land requisitioned by local authorities under emergency powers and in regard to which they have made contracts for use and occupation. A third class of allotments are those let by private owners to tenants.

New Provisions in regard to Notices to Quit Allotment Gardens

Section 1 of the Allotments Act, 1922, provided that the tenancy of an allotment garden could only be terminated by the landlord by a six months or longer notice to quit, expiring on or before April 6 or on or after September 29, or under certain powers of re-entry for non-agricultural purposes, breach of covenant or bankruptcy. In order to encourage allotment holders to plan ahead, section 1 of the 1950 Act extends the length of notice required to 12 months. The notice must still expire between the dates mentioned. This provision applies to all tenancies of allotment gardens, whether the landlord is a local authority or a private person, except that it does not apply to land let by local authorities under Defence Regulation 62A. It applies to notices to quit given on or after October 26, 1950, the date of the passing of the Act, and does not affect notices given before that date.

New Provisions as to Compensation for Tenants of Allotment Gardens

Section 2 of the Allotments Act, 1922, an obscurely worded section, provided that the tenant of an allotment garden should be entitled to compensation, in respect of growing crops and manure, when he quitted the land on the termination of the tenancy by the landlord, provided that the tenancy was terminated between April 6 and September 29 (it does not expressly say, by notice to quit) or by re-entry for the industrial and other purposes mentioned in section 1 (1) (b), (c) or (d) of the Act. In view of the fact that section 1 had laid it down that a notice to quit could only be given by the landlord to expire on or before April 6 or on or after September 29, the provision in section 2 about the termination of tenancies between April 6 and September 29, which would appear to refer to termination by notice to quit, is puzzling. Different views about its meaning have been suggested. That great authority upon all matters relating to agricultural law and indeed the law of landlord

and tenant generally, Aubrey John Spencer, considered that section 2 (2) could only apply in the case of a notice to quit given before the 1922 Act and current at its commencement (*a*), while the learned editors of *Halsbury's Laws of England* thought that section 2 (2) (a) refers to compensation recoverable where the tenancy is determined under section 1 (1) (e) for breach of covenant or bankruptcy, and was probably limited to compensation recoverable by a trustee in bankruptcy, or liquidator in the case of an association (*b*). Spencer's construction seems preferable, but the obscurity has now been removed by section 2 of the Allotments Act, 1950. This provides that compensation is recoverable if the tenancy is terminated by the landlord by notice to quit (no limitation being laid down about the date of its expiry) or by re-entry under section 1 (1) (b), (c) or (d) of the 1922 Act. This amendment, which greatly improves the position of the tenant of an allotment garden in regard to compensation, should help to encourage the movement.

Further encouragement should result from section 3 of the 1950 Act, which for the first time gives the tenant of an allotment garden a right to compensation for disturbance, of an amount equal to one year's rent. This right is not given where the tenancy is terminated by notice to quit; the fact that the tenant must be given twelve months' notice has been thought to be a sufficient protection. Compensation for disturbance is given where the tenancy is terminated by re-entry under section 1 (1) (b), (c) or (d) of the 1922 Act, also where the landlord's own tenancy terminates, and where the landlord is a local authority who have let unoccupied land under section 10 of the 1922 Act and whose right of occupation has itself terminated in accordance with that section. Compensation for disturbance under s. 3 of the 1950 Act is in addition to compensation for crops and manure under section 2 of the 1922 Act, as amended by section 2 of the 1950 Act.

It may be noted that section 2 of the 1950 Act applies to land let by local authorities under Defence Regulation 62A but that section 3 does not.

The 1950 Act does not affect the provisions for compensation for tenants of allotments, as distinct from allotment gardens, contained in section 3 of the 1922 Act, or, in the case of allotments let by a local authority, section 47 of the Small Holdings and Allotments Act, 1908. Where an allotment is an agricultural holding the provisions in regard to compensation in the Agricultural Holdings Act, 1948, will apply.

(*a*) Spencer's Small Holdings and Allotment Acts, 1908–1926, (3rd ed.), p. 153.
(*b*) *Halsbury's Laws of England*, 2nd ed., Vol. 1. p. 518, note (*t*).

Right of Landlord of Allotment Garden to Compensation for Deterioration

It has been considered only fair that the increased protection given to tenants of allotment gardens should carry with it increased responsibilities. Section 4 of the 1950 Act accordingly gives the landlord of an allotment garden a right to compensation, when the tenant quits the land on the termination of the tenancy, in respect of any deterioration caused by the tenant's failure to maintain the land clean and in a good state of cultivation and fertility. The amount of such compensation will be the cost of making good the deterioration. This provision applies to tenancies which terminate in consequence of notices to quit given, or legal proceedings commenced, on or after October 26, 1950, the date of the passing of the Act.

Section 4 does not apply to land let by local authorities under Defence Regulation 62A.

Miscellaneous Provisions in regard to Allotments and Allotment Gardens

Local authorities have found that section 16 (3) of the Allotments Act, 1922, which provides that allotments shall be let at a "full fair rent", gives rise to difficulties. Different interpretations have been given to the meaning of this expression, according to whether emphasis was placed on "full" or "fair", and most local authorities have felt that section 16 (3) debarred them from allowing incapacitated persons or pensioners a reduction of rent on grounds of poverty or special need, although some authorities have done so. Section 16 (3) has now been repealed, and section 10 of the 1950 Act provides that the rent is to be such as a tenant may reasonably be expected to pay for the land if let for use as allotments on the terms (other than terms as to rent) on which it is in fact let. Local authorities are, however, given specific power to let at a less rent if special circumstances exist. The general obligation of local authorities to provide allotments has been reduced, by section 9 of the 1950 Act, from the provision of allotments not exceeding one acre (section 23 (4) of the Small Holdings and Allotments Act, 1908) to the provision of allotment gardens. In the case of boroughs and urban districts with a population of 10,000 or more, the maximum obligation is still to provide allotment gardens not exceeding 20 poles in extent, as it was under section 13 of the 1922 Act. The amount of the loss which local authorities are empowered to incur in respect of allotments has been increased from the product of a 1½d. rate to that of a 2d. rate.

Section 12 of the 1950 Act: Abolition of Contractual Restrictions on Keeping Hens and Rabbits

Mention has been made above of section 12, which, although it is concealed in an Allotments Act, is not restricted in its application to allotments. Section 12 is based upon a recommendation in the Report of the Committee on the Organisation of Domestic Food Producers (published in May, 1950) that Defence Regulation 62B should be embodied in permanent legislation so far as hens and rabbits, but not pigs, were concerned. Defence Regulation 62B made it lawful, notwithstanding anything to the contrary in any lease, tenancy, covenant, contract or undertaking, and notwithstanding any statutory restriction, for the occupier of land to keep pigs, hens and rabbits on the land and to erect and maintain buildings or structures reasonably necessary for that purpose.

Section 12 of the 1950 Act is to come into force when Defence Regulation 62B ceases to have effect as respects England and Wales. As a result of the Defence Regulations (No. 1) Order, 1951 (SI 1951, No. 318) this will be July 1, 1951. (Defence Regulation 62B remains in operation as regards Scotland and Northern Ireland.)

Section 12 differs from the Defence Regulation in three respects. It does not apply to pigs, it applies only to hens and rabbits kept "otherwise than by way of trade or business", and it does not override the effect of any statute. Any statutory requirement in regard to permission, *e.g.*, under town and country planning legislation, must, therefore, be observed. Purely contractual restrictions are, however, entirely overridden. It should perhaps be mentioned that neither the Defence Regulation nor section 12 authorises hens or rabbits to be kept in such a manner as to be prejudicial to health or a nuisance.

It has been pointed out above that in the case of allotment gardens hens and rabbits can only be kept to a minor extent, since the plot must be wholly *or mainly* used for vegetable or fruit production. The abolition of contractual restrictions by section 12 does not remove this limitation, which is inherent in the definition of an allotment garden.

AGREEMENT FOR THE SALE OF "KNOW-HOW"*

By T. A. Blanco White, Barrister-at-Law

Most solicitors expect occasionally to be instructed to draw up a patent licence agreement or an agreement for the sale of patent rights, and the usual books of precedents include forms that are more-or-less adequate for these purposes. It does not appear to be quite so widely recognised (outside the business community itself) that the real importance of this sort of transaction often lies, not in the patents that are the ostensible reason for it, but in the subsidiary clauses providing for the handing-over of technical information. Indeed, it may well happen that this technical information—the "know-how"—is a saleable commodity in the absence of any patent rights at all. But whether there are patents or not, the standard forms of agreement are inadequate for most transactions to which "know-how" is of major importance.

Where a sale can be made outright, and for a lump sum, no particular problem arises. This, however, is necessarily rare. The mere fact that a concern is willing to give a substantial consideration to obtain technical information and assistance almost certainly means that it is proposing to enter an unfamiliar field, and consequently that it cannot foretell with any degree of assurance how the venture is likely to turn out. This being so, it would be unreasonable to ask for the whole consideration to be paid in advance, or to be assessed once and for all at the time of the making of the agreement. Almost always, then, some sort of royalty payment will be involved, and it is this that raises the difficulty.

The standard forms of agreement for licensing or selling patent rights in return for royalty, treat questions of technical information primarily from the side of the purchaser or licensee. That is to say, while many standard clauses relating to patents are highly favourable to the vendor or patentee—perhaps unreasonably favourable to him—the clauses dealing with technical information tend to be directed primarily towards ensuring that the inventor holds nothing back, merely ensuring in return that the licensee or purchaser pays any expenses involved in the supply of the information or assistance he requires. Where the patents are of dubious validity or easy to evade—as is usually the case—either this is simply ignored by the parties, or an attempt is made to

* A form of agreement, following the discussion below, is printed *post*, p. 509.

secure the position of the vendor or patentee by strengthening still further the clauses relating to the patents : demanding admissions of validity and undertakings not to depart from the designs covered by the patents, making royalty payable whether the patents continue to subsist or not, making the payment of royalty independent of the extent to which the patents are used, and so on.

There are of course cases in which the element of bluff is predominant and in which this method may be as good as any other. If, however, the transaction is a sound one commercially, in spite of the weakness of the patents, this is usually so because of the value of the " know-how ", in which case such attempts to rely on strong patent clauses are apt to be ill-judged. It is almost impossible to secure payment of royalties upon really weak patents except by clauses that are so obviously unreasonable as to be unacceptable unless the rates of royalty are made unduly low. In such cases it is better to recognise the weakness of the patents, to limit the liabilities of the licensee or purchaser in relation to them, and to place the main emphasis—in fact if not in form—upon the information itself.

Even in cases in which the patents have not been fully investigated by the purchaser, so that he is willing to take at their face value, it may well be unwise for the seller to take advantage of this. For one thing, even among English business men (who seem sometimes to make it almost a point of honour never to read agreements before signing them) it is becoming usual to expect some sort of relief from royalty payments under a patent licence should the patents turn out to be invalid. Although the standard forms in the books of precedents still make very little provision for such events, their acceptance by a licensee is only too often a sign that he thinks he is getting off cheap anyway. Obviously, however, the seller of information cannot accept a position in which the purchaser will get it free of royalty if the patents are successfully challenged. There is also another reason, of some importance in many cases, which is that if the parties pretend that the patents are the essential subject matter of the agreement they will probably render subject to income tax (under the Income Tax Act, 1945) any lump-sum payment that the seller receives. In fact, it is usually obvious that the real consideration for any down payment is information and not patents, but if the agreement is phrased primarily in terms of patents this fact may well be difficult to explain to a tax-gatherer.

It may even be desirable to avoid all reference to patents. English law forbids, in agreements concerned with patent licences,

two sorts of provision that may be of great value when one concern is assisting another to enter a new industrial field. They are, provisions whereby certain special raw materials or semi-manufactures are supplied exclusively by the old concern to the new, and provisions whereby the agreement continues in force for a definite period whether the patents survive or not.[1] In the sort of case we are concerned with, it may often be possible to avoid these difficulties by ensuring that the transaction does not, strictly speaking, involve a patent licence. Since, however, it is not an easy matter to devise a form of words that will give the effect of an express patent licence without falling within these sections, it will in general be simpler to leave patents out of the agreement altogether, merely taking a covenant for quiet enjoyment, from the vendor of the information, that will preclude him from claiming any right to enforce any sort of legal monopoly against his purchaser so long as the purchaser complies with the agreement. There may of course be cases where it is so clear that a patent licence is intended that even a covenant of this sort will bring the Patents Act into play; but in general this should not be so.

Before discussing the form such an agreement should take, it is necessary to consider in a little more detail the form the consideration should take. Some sort of lump-sum payment on the signing of the agreement will usually be appropriate, since it must be recognised that once the seller has handed over the initial batch of information and documents he will have little redress against a change of mind on the part of the purchaser. Beyond that, it is common to provide for some sort of royalty on turnover. But it may turn out to be impossible to reach agreement as to what the royalty is to be paid on. The purchaser, who inevitably is buying his pig in a poke, is often afraid that the information he is buying may turn out to be useless : the seller's drawings may turn out to be unusable, his designs impracticable, his manufacturing techniques dependent upon the peculiar skills of his key workmen, and so on. In that event, the purchaser may have to develop his own designs and methods, hurriedly and under great difficulties: and he is apt to feel that it must be clear that he will not then be liable to pay royalties. On the other hand, the seller will not want to run the risk, after all his valuable information has been handed over, of the purchaser's modifying his designs and then claiming freedom from royalties. The answer to this sort of difficulty (if an acceptable compromise cannot be worked out by the draftsmen) may well lie in an acceptance by the seller of the risk of failure to work: either in the form of an

[1] See s. 57 and s. 58, respectively, of the Patents Act, 1949.

undertaking that the seller will continue to give technical help (perhaps at his own expense) until the new plant is in satisfactory commercial production, or in the form of accepting a share of profits instead of a percentage on turnover. In the latter case, the agreement may conveniently provide, not for payment of royalty, but for the issue to the seller of shares in a company formed to make use of the information he is selling.

The hardest case of all in which to devise a satisfactory consideration is that of supply of information by an individual designer or inventor to a large manufacturing concern. For one thing, the purchasing company is likely to want to re-design everything for convenience in tooling and in factory management generally, thus making it very hard to define the extent to which the seller's information has been used at all. But there is a more fundamental difficulty than this. Part of the difficulty, in any sale of technical information, is that much of the information handed over will be neither new nor secret, although it may well not appear in any standard textbook of the art concerned. Naturally, the purchaser does not want to pay royalties for using information he had already; but in the ordinary way, the purchaser of information will accept the fact that the seller knows more than he does and will be willing to accept a reasonably widely drawn royalty clause on the basis that if the seller's methods turn out to be usable at all they are certain to incorporate a good deal of indispensable information. Where the purchaser is a large concern with its own research department, the position is likely to be different: everything the seller can teach will be somewhere in the purchaser's files, and once the seller's detailed designs have been scrapped, it will seem to the purchaser that it has gained nothing at all for its money. Furthermore the seller must reckon with a serious risk that if the enterprise is not immediately successful on a large scale, the purchaser will simply lose interest, write off the initial expenditure it has incurred and drop the whole project. In such a case, it will be worth the seller's while to be "tough" in negotiating the terms of agreement even at the cost of a substantial reduction in purchase price. In particular, to the extent that the consideration is not in lump-sum form, he should see that royalty clauses are wide and that there are stringent provisions either for minimum royalties or for determination of the agreement if the purchaser does not go ahead with the enterprise.

Next, there is the question of keeping confidential information confidential. The trouble about this question, is that it is most important in the period before the agreement is signed: in the

course of negotiating the agreement it is usually necessary to hand over a large part of the information involved. This is particularly so where the transaction is on a smallish scale. In the sort of deal where one concern agrees to build the other a factory and show it how to get the factory running, any trade secrets can usually be held up until building has started. But in the sort of deal where the seller is doing little more than provide a few blue-prints and teach the buyer's workmen a few new tricks, it is essential that a preliminary agreement should be made which will protect the seller if the deal falls through. (A suitable form is given at p. 509, *post*.) Similar clauses are valuable to cover the initial period; but once the new enterprise is well under way they tend to lose their importance so far as their ostensible purpose goes. They have, however, another purpose: that of ensuring that if either party has occasion to determine the agreement prematurely (whether under section 58 of the Patents Act or otherwise) it will be difficult for the purchaser to keep on with the new business.

One other question deserves detailed discussion: what sort of permanent relations are envisaged between the parties? Where the seller is not himself in business as a manufacturer in the field the buyer is proposing to enter—if he is an inventor, designer, technical consultant or production engineer, for instance, whose business lies merely in helping other people set up manufacture—this question is seldom important; if the parties envisage any enduring relationship, it will merely be that they contemplate doing business again some day. It may, however, be very important, in cases where the selling company is (in effect) helping to establish a competitor. (It may be added that, for obvious reasons, such cases are commonest where buyer and seller are established in different countries.) In such cases, three points arise : is there to be exchange of technical information and if so, for how long and between whom; what is to happen, when the agreement finally expires, to the various sorts of tangible and intangible property involved in it; and, what provisions, if any, should there be restricting direct competition between the two concerns?

As to the first of these points, it will usually be difficult for either party to resist a demand by the other for the handing-over of any fresh technical information, relevant to the agreement, that may be acquired during the continuance of the agreement. Thus as between the actual parties, the main question is whether the one party is likely to find out anything worth the other's troubling with; so that a clause providing for exchange should

usually be put in, but may be struck out for prestige reasons. In addition, however, there is usually more than one purchaser involved: the same information will be sold to several purchasers, each for a different area. The vendor will usually be wise, if future information is to be exchanged at all, to reserve the right to supply to the other purchasers information given him by any one of them: keeping the different lots of information separate is unlikely to be practicable, and purchasers ought to understand from the outset what the position will be. On the other hand, a purchaser is likely to refuse to make his own private "know-how" available to his immediate competitors, so that if for any reason he is not to have exclusive rights (at least in his own area) it may be better not to arrange for exchange of information at all.

As to the second point, a sufficiently powerful vendor may be able to insert a clause providing for the return to him of all drawings, specifications and the like, and for the cancellation of patent licences and rights to use trade marks, when the agreement expires—the purpose being, to ensure that termination of the agreement (whether under a statutory power or otherwise) is made as hard as possible for the purchaser. A slightly less powerful vendor may be able to insist only on cancellation of patent licences and trade mark arrangements if the agreement goes, the purchaser keeping the various documents and the right to make use of them; this will discourage determination to some extent. Agreements between equals are commonly made for a definite period, at the end of which all payments cease but patent licences and so on remain in existence. It will often be convenient in such cases, so far as concerns any territory in which a party has exclusive or predominant rights, for that party to retain not merely licences under the other's patents but the patents themselves.

As to the third point, it is often convenient, if anti-trust legislation permits, to give to each party a territory in which the other will be precluded from competing within the field of the agreement. There may also be territories open to both parties, and territories closed to both parties (having already been assigned to another purchaser). It does not follow, however, that because it is desirable to give the parties exclusive manufacturing rights in certain territories it is necessarily wise to preclude them from selling in each other's areas.

It will, of course, be appreciated that the form of agreement which follows cannot do more than suggest the sort of clauses that agreements of this nature might contain: in an actual case, almost every clause is likely to need alteration for commercial reasons. In relation to clauses concerned with patents, and even more

in relation to the clause concerned with trade marks, a further point must be borne in mind: they are fully applicable only to United Kingdom patents and trade marks. The patent clauses are more-or-less applicable in most legal systems other than the Spanish; but the trade mark clause relies on provisions of our law that are almost unique.

WILLS AND SETTLED LAND ACT TRUSTEES

By E. O. Walford, LL.D.

It is not proposed in this article to attempt to deal with or enumerate all the cases or circumstances in which persons are or may become Settled Land Act trustees under section 30 of the Settled Land Act, 1925, which is the section defining the persons who are trustees of Settled Land Act settlements for the purposes of that Act (*a*), but to deal with cases in which section 30 (3) of the Act applies, with the result that personal representatives of a testator settlor have become trustees of the settlement created by his will.

Finding Trustees

In order to ascertain who are the trustees of a Settled Land Act settlement it is essential to see what powers of sale (present or future) of the settled land are given to the trustees of the settlement, or whether under the settlement there exist trustees "with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold or otherwise dealt with", or trustees having power to consent to or approve of the exercise of such a power of sale (S. L. A., 1925, s. 30 (1) (iii)), as such persons may be trustees of the settlement for the purposes of the Settled Land Act, 1925. It should be noted :—

(a) That persons nominated as trustees of the settlement for the purposes of the Settled Land Act, 1925, are not necessarily the trustees for such purposes, curious though that fact may seem. The reason is that by virtue of section 30 (1) (i) if there are trustees "who are for the time being under the settlement, trustees with power of sale of the settled land (subject or not to the consent of any person)", or trustees "with power of consent to or approval of the exercise of such a power of sale" then those persons will be the trustees of the settlement for the purposes of the Settled Land Act, 1925, notwithstanding the purported nomination in the settlement of other persons as trustees of the settlement : see the concluding words of section 30 (1) (i) of that Act. The

(*a*) The general remarks in the early part of this article will therefore be clearer if the reader has before him section 30 of the Settled Land Act, 1925.

persons nominated by the settlement as the trustees thereof for the purposes of the Settled Land Act, 1925, come next on the list : see section 30 (1) (ii) of the Act.

It will be observed that only persons who are under the settlement *trustees* with such a power as above mentioned can qualify as trustees of the settlement under section 30 (1) (i).

(b) If A and B are trustees holding money upon trust to invest it in land (say Blackacre) to be held on the same trusts as land (say Whiteacre) comprised in the settlement in question and such an investment is made accordingly by A and B, the land so purchased is "other land comprised in the settlement" and A and B will be trustees of the settlement for the purposes of the Settled Land Act, 1925, s. 30 (1) (iii) (*Re Moore*, [1906] 1 Ch. 789) failing trustees within section 30 (1) (i) or section 30 (1) (ii) of the Act.

(c) If a testator gives property to his wife and a third party upon trust for the wife for her life and then upon trust for sale, they will be trustees holding under a future trust for sale and may therefore, failing trustees within the definitions in section 30 (1) (i) to (iii) of the Act, be trustees of the settlement for the purposes of the Settled Land Act, 1925 : see section 30 (1) (iv) of that Act, and cf. *Re Jackson's Settled Estate*, [1902] 1 Ch. 258; *Re McCurdy's Settled Estate*, 27 L. R. Ir. 395. Immediate trusts for sale do not require consideration here as such a trust will prevent the land from being subject to a Settled Land Act settlement.

(d) That a well drawn post-1925 will should not normally contain an immediate power of sale in respect of land of which a Settled Land Act settlement is created by that will, because the tenant for life or statutory owners will have an overriding power of sale by virtue of the Settled Land Act, 1925, and the power of sale conferred by the will will be nugatory. Nevertheless for the purpose of identifying the Settled Land Act trustees the purported power of sale will be decisive because it is provided by section 30 (2) of the Act, in effect, that one is to ignore the fact that the power of sale will be exercisable by the tenant for life or statutory owners, and not by the trustees to whom the settlor has purported to give the power of sale.

(e) That paragraph (v) of sub-section (1) of section 30 of the Act may sometimes save the expense of an application

to the Court to appoint Settled Land Act trustees. Under that paragraph, failing trustees qualified to act under section 30 (1), paragraphs (i) to (iv), if all the persons who are able by virtue of their beneficial interests or by the exercise of an equitable power to dispose of the settled land in equity for the whole estate the subject of the settlement agree upon the persons to be appointed as trustees of the settlement they can together execute an effective appointment of trustees of the settlement.

For example, if all the beneficiaries are *sui juris* they can appoint persons to act as trustees of the settlement in such circumstances.

Settlements by Will

Whilst this introduction was considered to be desirable in order to draw attention to the fact that it is always necessary carefully to examine the settlement in order to see whether settlement trustees already exist, the main object of this article is to consider section 30 (3) of the Settled Land Act, 1925, in relation to the search for Settled Land Act trustees of settlements created by will. That sub-section provides as follows :—

> "Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy, and apart from this subsection there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly."

That provision is a most useful one, and is very often invoked. For example, in many cases property is left by will upon trust for someone for life and then upon trust for his children, or for a stranger, in fee simple, but no persons are nominated in the will as trustees of the settlement for the purposes of the Settled Land Act, 1925, nor is any power of sale conferred on the trustees of the will. In such cases section 30 (3) may save an application to the Court to appoint such trustees.

Death of Personal Representative Trustees

In many cases there will be no difficulty, as there will have been a general grant of probate without excluding the settled

property. It will be recalled that section 22 (1) of the Administration of Estates Act, 1925, provides that a testator is deemed to have appointed as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement, and probate may be granted to such trustees specially limited to the settled land; but in that provision "settled land" means land settled *before* the testator's death and not by his will (*ibid.*). Thus, if a person who is tenant for life under a will or settlement dies and the land remains settled land after his death a special grant limited to the settled land may be necessary; but that is not the type of case with which it is proposed to deal in this article. Assuming then, that a strict settlement has been created by the will of A, and B and C the executors therein named have proved the will, all is well so long as at least one of them is living. The survivor can appoint another trustee to act with him for the purposes of the Settled Land Act, 1925. In the writer's experience, however, it seems that the necessity for an express appointment of an additional trustee *for the purposes of the Settled Land Act, 1925*, is often overlooked. the survivor either appointing a new trustee or trustees "of the Will" without any reference to the Settled Land Act, 1925, and then dying, or dying without appointing a new trustee, and sometimes without executing a vesting assent.

Whilst I do not recall any express decision covering the point it seems reasonably clear from the scheme of the Settled Land Act, 1925, that an appointment of new trustees of a will, without more, does not make the new trustees trustees of property settled by the will *for the purposes of the Settled Land Act, 1925*, unless the will itself appointed the original trustees trustees for those purposes. If it did, then the opinion is hazarded that unless there are other persons better qualified to act as trustees of the settlement, an appointment by the trustees or surviving trustee(s) of that will of new "trustees of the will" (without referring to the purposes of the Settled Land Act, 1925) would be effective to constitute the new trustees trustees of any Settled Land Act settlement created by the will. That would seem to be reasonably clear from section 33 of the Settled Land Act, 1925, to which I will refer again shortly.

I have mentioned above persons better qualified to act as trustees of the settlement, because the mere declaration by a testator of his intention that the executors and trustees of his will, or other specified persons shall be trustees for the purposes of the Settled Land Act, 1925, of any settlement of land created by his will is not necessarily effective. As

already indicated above if there are in fact any other persons who are constituted by the will *trustees* with immediate power to sell the settled land or to consent to or approve of the exercise of such a power of sale, those persons will be the trustees of the settlement for the purposes of the Settled Land Act, 1925, and the declaration by the testator as above-mentioned will be ineffective: see S. L. A., 1925, s. 30 (1) (i). Suppose then that there are two executors of the will of A by which will certain land is settled, and by virtue of section 30 (3) of the Settled Land Act, 1925, those executors become trustees of the settlement of that land for the purposes of the Settled Land Act, 1925, and that both executors then die, leaving the tenant for life them surviving. What is the appropriate course to pursue in those circumstances? Several statutory provisions are worthy of consideration.

In relation to section 30 (3) of the Settled Land Act, 1925, it will be observed that where there is a sole personal representative of the testator settlor, he is required by that sub-section to appoint an additional trustee to act with him for the purposes of the Act; and it is provided that "the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply *accordingly*". This wording raises the question whether all the provisions of the Trustee Act, 1925, s. 36, concerning the appointment of new trustees are also applicable, or whether it is only for the purpose of appointing an additional trustee that that section is to apply.

Trustee Act Powers

It is provided by section 64 (1) of the Trustee Act, 1925, that *all* the powers and provisions contained in that Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purpose of the Settled Land Act, 1925, . . . whether such trustees are appointed by the Court, or by the settlement or under provisions contained in any instrument. By virtue of section 117 of the Act "instrument" includes an Act of Parliament. It seems, therefore, that section 64 (1) is applicable to trustees who become such under the provisions of section 30 (3) of the Settled Land Act, 1925. It is submitted that where personal representatives become trustees of a settlement by virtue of the last-mentioned sub-section, they can be said to be "appointed" under provisions contained in an Act of Parliament. There is, indeed, authority for the proposition that when a statute declares that a class of persons shall exercise certain functions, *e.g.*, that of

Improvement Commissioners, each member of that class is properly said to be "appointed" to exercise that function: *Nicholson* v. *Fields*, 31 L. J. Ex. 233. On the other hand, it is to be assumed that the draftsman of section 30 (3) of the Settled Land Act, 1925, did not think that it would be clear that the provisions of the Trustee Act, 1925, relating to the appointment of new trustees would apply in the absence of an express declaration to that effect. It must not, therefore, be lightly assumed that those provisions are applicable except for the specific purpose mentioned in section 30 (3) of the Settled Land Act, 1925, namely, the appointment of an additional trustee for the purposes of the Settled Land Act, 1925, by a sole personal representative of a testator settlor. Is there, then, any ground for contending that in relation to section 30 (3) cases the application of the provisions of the Trustee Act, 1925, concerning the appointment of new trustees is limited to the appointment of a co-trustee in such cases as last mentioned? In order to consider that question it is necessary to examine more closely the wording of section 30 (3). It will be noted that if there are no other Settled Land Act trustees the sub-section constitutes as trustees for the purposes of the Settled Land Act, 1925, until other trustees are appointed, the personal representatives of the deceased testator settlor (in the case with which we are dealing here).

It is proposed to examine first the significance of the words "personal representatives", and then to consider the phrase "until other trustees are appointed".

Personal Representatives for the Time Being

For the purposes of the Settled Land Act, 1925, "personal representative" is defined by section 117 of that Act as meaning "the executor, original or by representation, or administrator *for the time being* of a deceased person, and where there are special personal representatives for the purposes of the settled land means those personal representatives".

We are concerned only with the earlier part of that definition. Applying it to section 30 (3) it will be seen that the result is that the executor(s) original or by representation or administrator(s) *for the time being* of the testator settlor will, until other trustees are appointed, be the trustees of the settlement. Thus, if the survivor of two executors dies and by his will appoints an executor who proves his will the "chain of executors" will be unbroken and his executor will be the "personal representative for the time being" of the testator settlor, and as such may qualify as the trustee of the settlement for the purposes of the Settled Land Act, 1925, until other trustees are appointed. Similarly, if the

original executors of the testator settlor die and a grant of administration *de bonis non* is taken out the grantee(s) will be the personal representative(s) for the time being of the original settlor.

Until Other Trustees are Appointed

Turning now to the phrase "until other trustees are appointed", it will be recalled that by virtue of section 30 (1) (v) of the Settled Land Act, 1925, if there are persons who together, by virtue of their beneficial interests or by the exercise of an equitable power, can dispose of the settled land in equity for the whole of the estate which is the subject of the settlement, they can appoint trustees of the settlement for the purposes of the Settled Land Act, 1925, and thus oust the personal representatives (and presumably any additional trustee appointed by a sole personal representative of the testator settlor). I will return to that point in greater detail later. Again it is possible for the Court for special reasons to appoint trustees of the settlement for the purposes of the Settled Land Act, 1925.

All Executors Dead

The case which we have first to consider is one in which the sole executor has died or all the executors have died, and no additional trustee for the purposes of the Settled Land Act, 1925, has been appointed, or if appointed, has died. The executors may have executed the necessary assent containing the requisite particulars, and may in all other respects have completed their duties as administrators; but they will not then automatically cease to be trustees under section 30 (3) for the purposes of the Settled Land Act, 1925 (so decided by Russell, J., in Chambers): *Law Journal Newsp.* for 1926, p. 436.

Let us now suppose that A has by his will created a settlement of certain land and has appointed executors and trustees thereof but has not appointed them trustees of the will (or of the settled land specifically) for the purposes of the Settled Land Act, 1925. The executors have died, and the last survivor has either not made a will or has not appointed an executor of his will. The tenant for life is still living. How are trustees of the settlement to be found assuming that paragraphs (i) to (v) of section 30 (1) of the Settled Land Act, 1925, do not apply or cannot be invoked?

Settled Land Act 1925, s. 33

Bearing in mind the provisions of section 64 of the Trustee Act, 1925, as above-mentioned we now turn to section 33 (1) of the Settled Land Act, 1925, and find that under that sub-section

where any persons have been appointed or constituted trustees of a settlement (*inter alia*) by virtue of the Settled Land Act, 1925, those persons *or their successors in office* are to remain and be trustees of the settlement so long as that settlement is subsisting or deemed to be subsisting for the purposes of the Settled Land Act, 1925, but it is obvious that that provision must be read, in the case of section 30 (3) trustees subject to the words " until other trustees are appointed ". The phrase " successors in office ", if standing alone and read in conjunction with section 30 (3) of the Settled Land Act, 1925, would seem to refer to persons succeeding to the office of personal representatives of the testator settlor. It is, however, expressly declared by section 33 (1) of that Act that in that sub-section the words " successors in office " mean " the persons who by appointment or otherwise have become trustees for the purposes aforesaid ", *i.e.*, for the purposes of the Settled Land Act, 1925. The intention and effect of that sub-section are not clear. By virtue of section 30 (3) of the Act the personal representatives for the time being of a testator settlor are, in the circumstances mentioned in that sub-section, automatic trustees of the settlement; and it has already been pointed out that those personal representatives may be either the original ones, or executors of the testator settlor by virtue of a chain of executorship, or administrators *de bonis non*. It may be that the object of the definition of " successors in office " in section 33 (1) is to stress the fact that when construing that sub-section the " office " for which one is to look is that of trustee. Thus, the last survivor of two executors or administrators of the will of a testator settlor may have appointed an additional trustee to act with him for the purposes of the Settled Land Act, and may then have died leaving the testator's estate not fully administered, and a grant *de bonis non* may then have been taken out to the testator's estate by a member of the family, no assent in favour of the life tenant having been made meanwhile. The grantee would undoubtedly be the personal representative of the testator settlor; but reasons are given later in this article for the view that, in such a case, he could not claim to act as personal representative in competition with the additional trustee appointed by the surviving executor, or by a sole executor. Suppose, however, that no such additional trustee had been appointed before the further grant was taken out to the estate of the testator settlor, the grantee under the further grant would qualify as trustee of the settlement under section 30 (3) because there would not, " apart from " that sub-section, be any trustee of the settlement, nor would any other trustee have been appointed. If, however, the personal

representative of the sole or last surviving executor appoints another person or other persons to be trustee(s) of the settlement for the purposes of the Settled Land Act, 1925, what is the result of such an appointment, and does it matter whether the appointment is made after the grant *de bonis non* or before it?

Competition for Trusteeship

In order to deal with that problem it is first necessary to return to the question broached above, namely, whether personal representatives of a testator (when qualified to act as Settled Land Act trustees) are trustees solely *virtute officii* with the result that upon their death and the issue of a further grant to the testator's estate the new personal representatives become trustees for the purposes of the Settled Land Act, 1925, and can claim to act as such notwithstanding any appointment made by the personal representative(s) of the sole or last surviving executor, and in that connection whether the only power which a personal representative trustee has under section 30 (3) of the Settled Land Act, 1925, is to appoint an additional trustee to act with him in the trusteeship so long as he is living and retains the office of trustee. There is certainly no such express limitation in the Settled Land Act, 1925, or the Trustee Act, 1925, and I do not think that it can be implied, for the reasons given later.

To complicate matters still further—suppose that the personal representatives of the sole or last surviving original personal representatives of the testator (not being his executors (*b*)) appoint new trustees for the purposes of the Settled Land Act, 1925, and all the persons beneficially interested in the settled estate then appoint other persons as new trustees pursuant to section 30 (1) (v) of the Settled Land Act, 1925. Will the last-mentioned appointment oust the trustees appointed by the personal representatives? It is true that section 30 (3) of the Settled Land Act, 1925, provides that the personal representatives of the testator settlor are to be trustees of the settlement only until other trustees are appointed, and in the case last mentioned other trustees have been appointed by the personal representatives of the original personal representatives; but it is submitted that as neither personal representatives nor any other persons can be trustees after they have died, an appointment of new trustees made after the death of original personal representatives and before the issue of a new grant of administration to the estate of a testator settlor is not an appointment to which the words "until

(*b*) As to this point see the remarks in a later part of this article, identified by footnote (*c*) to this article.

other trustees are appointed " can apply. There is no provision to the effect that persons who are appointed as trustees by virtue of section 36 or any other section of the Trustee Act, 1925, are to be trustees only until other trustees are appointed. It was thought at one time that if a sole trustee died and his personal representatives lawfully acted as trustees they could continue to do so notwithstanding any appointment made in exercise of a power to appoint new trustees contained in the settlement. That view was, however held to be erroneous in *Re Routledge's Trusts*, [1909] 1 Ch. 280 (*c*).

In relation to competition between an appointment of trustees made under section 30 (1) (v) of the Settled Land Act, 1925, and an appointment made under section 36 of the Trustee Act, 1925, the position is rather different from that which arose in *Re Routledge*, *supra*, because in the case now under consideration it is assumed for the present purpose that the appointment by administrators under section 36 of the Trustee Act, 1925, makes them trustees in the fullest sense of that word, at any rate for the time being. Before proceeding further it may be desirable to remind the reader that by virtue of the provisions of section 30 (3) of the Settled Land Act, 1925, as read with the definition in section 117 of that Act of " personal representatives ", the executor(s) of a sole executor or of a last surviving executor is a personal representative of the testator settlor within the meaning of section 30 (3) and (in the words of section 30 (3)) " if apart from this sub-section there would be no trustees for the purposes of this Act " then such executor(s) would automatically become such trustees in relation to any settlement created by the will, but only " until other trustees are appointed ". Now " apart from " that sub-section, namely, under section 30 (1) (v) abovementioned, an appointment of trustees can be made by all the persons beneficially interested under the settlement. Hence, immediately such an appointment is made there are " apart from " section 30 (3) other Settled Land Act trustees; and as section 30 (3) trustees are trustees only " until other trustees are appointed " they are completely ousted by an appointment under section 30 (1) (v).

If, therefore, executors of the last surviving or sole executor

(*c*) It will be remembered that it is now provided by section 18 of the Trustee Act, 1925 (*inter alia*), that *until the appointment of new trustees*, the personal representatives of a sole trustee, or of the last surviving or continuing trustee can exercise or perform any power or trust given to or capable of being exercised by such sole or surviving or continuing trustee or other the trustees or trustee for the time being of the trust. They are not described as trustees but are given the powers which trustees would have if they existed.

of a testator can be ousted as last mentioned, but persons appointed trustees for the purposes of the Settled Land Act, 1925, by administrators of the last surviving or sole executor of a testator settlor cannot be so ousted, the position would be somewhat peculiar; and it does not seem probable that such a result was intended by the Legislature. The argument that trustees so appointed as last mentioned could be displaced might be based upon the fact that the original personal representatives (or for that matter administrators *de bonis non*) of the testator, can act only so long as no other trustees are appointed, from which it could be argued that if section 36 of the Trustee Act, 1925, does enable the administrators of a sole or last surviving personal representative who is *ex officio* the trustee for the purposes of the Settled Land Act, 1925 of a settlement created by the will of a testator to appoint new trustees of the settlement in order to replace the *ex officio* trustees they, like the *ex officio* trustees, are trustees " until other trustees are appointed " and cease to be trustees if persons having a power of appointment choose to exercise that power. There is, however, so far as I am aware, no express judicial or statutory authority for this view. Indeed, so far as it goes section 36 of the Trustee Act, 1925, tends to support the opposite view. Far from limiting the authority of a person who is appointed a trustee under that section, sub-section (7) of that section expressly declares that :—

> " Every new trustee appointed under this section . . . shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee *by the instrument, if any, creating the trust* ".

When that provision is read with section 33 of the Settled Land Act, 1925, and section 64 of the Trustee Act, 1925 (to which sections reference has already been made above), the case for contending that new trustees of the settlement appointed by personal representatives as above mentioned are not ousted by an appointment under section 30 (1) (v) of the Settled Land Act, 1925, seems very strong. Nevertheless the result, if section 36 is available in such cases, seems, as I have already suggested, rather curious. Can any other solution of the problem be found? It may be that despite the wide terms of section 36 (7) and section 64 of the Trustee Act, 1925, section 30 (3) of the Settled Land Act, 1925, is to be construed strictly. It will be recalled that that sub-section when read with the definition of " personal representative " in section 117 of the Act, provides that if apart from that sub-section there would be no Settled Land Act trustees the personal representatives *for the time being* (my own italics)

of the deceased testator settlor shall, until other trustees are appointed, be by virtue of that Act (Settled Land Act, 1925) the trustees of the settlement, which by definition in section 30 (1) of the Act means the trustees of the settlement for the purposes of the Settled Land Act, 1925.

There follows a provision requiring a sole personal representative to appoint an additional trustee to act with him for the purposes of the Act, and a declaration that the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly. Now, in relation generally to Settled Land Act trustees it is quite plain from section 64 of the Trustee Act, 1925, that the provisions of that Act with reference to the appointment of new trustees, and the discharge and retirement of trustees apply to and include trustees for the purpose of the Settled Land Act, 1925. Despite section 33 of the Settled Land Act, 1925, which must, like all other provisions of a statute, be read subject to any contrary provision in any other part of the Act, it seems possible to construe section 30 (3) as conferring authority upon the personal representative(s) *from time to time* of the testator settlor to act as trustee(s) with the proviso that if there is only one such representative he must appoint another person *to act with him.* It is, of course, impossible to deny that an original personal representative (say X), or any additional trustee appointed to act with him in such circumstances as above mentioned is a trustee of the settlement; but it is possible to contend that the trusteeship is held by both such trustees only during such period as the office of personal representative is held by X, which will normally mean during the lifetime of X, the trusteeship then passing to any person who takes out a grant *de bonis non.* If, however, that view is accepted then in a case where the executor dies, but a grant *de bonis non* seems inappropriate, and in fact is not taken out, the trusteeship will be left *in vacuo*, notwithstanding the fact that a valid appointment of an additional trustee was made by the original executor (or other personal representative of the testator) and such trustee is still living. I think that if it had been intended that any such additional trustee should hold office only during the lifetime of the appointor the Legislature would have so provided. Moreover, the above-mentioned statutory provisions, so far as they go, are far more heavily weighted in favour of the view that any such additional trustee has all the powers conferred on Settled Land Act trustees by section 36 (as read with section 64) of the Trustee Act, 1925, in relation to the appointment of new trustees, and that the provision which enables the personal representative(s) of a sole

or last surviving trustee to appoint new trustees, applies to the personal representatives of an additional trustee appointed pursuant to section 30 (3) of the Settled Land Act, 1925, and who survives the appointor.

I am reinforced in that view by an opinion of counsel which dealt with the following problem. A appoints B executor of his will, and dies. B proves the will, but does not wish to act as trustee of a Settled Land Act settlement created by A's will. Can B appoint C to be an additional trustee pursuant to section 30 (3) of the Settled Land Act, 1925, and then retire from the trust? Counsel advised that the reason for the provision requiring the appointment was to preclude the possibility of there being one trustee only for the purposes of the Settled Land Act, 1925, and that " accordingly " section 30 (3) would be construed as meaning that it was obligatory upon B " to appoint an additional trustee to act with him for the purpose of this Act if he himself continues to act ", and would not preclude him from retiring and appointing two new trustees under the Trustee Act, 1925, ss. 64 (1) and 36 (1).

I agree with that view and think that the various statutory provisions above-mentioned lead, on balance, to the inevitable conclusion that the obligation imposed by section 30 (3) of the Settled Land Act, 1925, upon a sole personal representative who is a Settled Land Act trustee to appoint another trustee with him, and the limited reference therein to the application of the Trustee Act, 1925, in relation to such appointment do not have the effect of depriving the personal representative, trustee or any person whom he appoints as additional trustee of the other powers conferred by sections 64 and 36 (1) of the Trustee Act, 1925, of appointing new trustees.

Whilst it may seem logical that a person who is appointed to act with a trustee who will be ousted by an appointment made during the lifetime of his co-trustee should also be ousted by an appointment made after the death of his co-trustee, there is no rule of law or statutory provision which expressly lays down such a rule, so far as I am aware. In a sense an additional trustee appointed by a personal representative trustee in accordance with section 30 (3) of the Settled Land Act, 1925, may be said to owe his existence and to derive his powers from section 30 (3), but the other statutory provisions mentioned above contain no qualification in relation to the tenure of office of such an additional trustee, and in the absence of any such qualification, or of any indication in section 30 (3) that an additional trustee appointed thereunder ceases to be a trustee on the death of the personal representative who appoints him, or on other trustees being

appointed, it is difficult to see on what ground his tenure of office can be held to cease in such an event, particularly in view of the express provision in section 36 (7) of the Trustee Act, 1925, which appears to put such a trustee in the same position as if he had originally been appointed *by the will* a trustee of the settlement for the purposes of the Settled Land Act. Nevertheless, I think that an appointment under section 30 (1) (v) of the Act would displace an additional trustee appointed by a sole personal representative trustee, even if that appointment were made after the death of the personal representative.

In my view section 30 (3) establishes a special category of trustees who can act so long as certain conditions continue. Those conditions are :—

(1) That apart from section 30 (3) no trustees can be found under the other provisions contained in the Act.

(2) That the trusteeship constituted by section 30 (3) ceases when other trustees are appointed (*i.e.*, validly appointed).

It is admitted that those conditions are expressed as conditions under which a personal representative may become and remain a trustee for the purposes of the Settled Land Act, 1925, and that the sub-section does not state that any additional trustee appointed (as required under that sub-section) by a sole personal representative is to hold office only upon the same conditions as the personal representative with whom he is appointed to act. However, in my opinion, although section 36 (7) of the Trustee Act, 1925, may be cited in support of the argument that a trustee appointed to act with a sole personal representative is not subject to the conditions (1) and (2) above set out, I think that the better opinion is that the last-mentioned sub-section is the very section which does place the additional trustee under the same conditions as to tenure of office as the personal representative by whom he is appointed. By the sub-section in question it is provided that such an additional trustee is to have " the same powers, authorities, and discretions " and the right to act in all respects " as if he had been originally appointed a trustee by the instrument, if any, creating the trust ". Now if the additional trustee had been originally appointed a trustee to act with a personal representative who was acting under a statutory provision which appointed him to that office upon condition that no other trustee was available and limited his tenure of office until such time as other trustees were appointed, it does not seem unreasonable to contend that such an additional trustee could act as trustee so long only as his co-trustee could act if living. In other words one should, it is submitted test the position, whenever an additional trustee has been appointed by a

sole or last surviving personal representative trustee, as if there were two personal representatives acting by virtue of section 30 (3) as trustees. If that is the correct view, it is plain that both before, and after, the death of the personal representative trustee, the additional trustee as well as the personal representative trustee would be ousted by an appointment under section 30 (1) (v) of the Settled Land Act, 1925. It is submitted that successors appointed by a surviving "additional" trustee would be in the same position.

An Illustrative Case

As this article was inspired by a problem which can be stated shortly, and which raised most of the points discussed above and one further point, it may be worth while stating the problem, and suggesting the answer as a convenient method of summarising very shortly the conclusions arrived at and stated above.

The facts were as follows: A had by his will created a settlement of land in favour of his wife for life and thereafter for his children. He appointed B and C executors and trustees. Upon A's death in 1938 B and C proved his will and assented to the *vesting in the executors* as Settled Land Act trustees. Both executors subsequently died, no new trustees for the purposes of the Settled Land Act having been appointed. The questions which were raised were as follows:—

1. Who could appoint Settled Land Act trustees?
2. Could the tenant for life do so?
3. What was the effect of the assent?
4. Was any further grant to the estate of A necessary?
5. Generally what should be done to put the title of the tenant for life in order?

The answers to the questions would appear to be as follows:—

1. The appointment of new trustees could most conveniently be made under section 30 (1) (v) of the Settled Land Act, 1925, by the widow and children (if all of age). The advantage of that course over any other course is that such trustees cannot be displaced. However, if that course is impracticable, personal representatives or a personal representative of A may be found by virtue of section 30 (3) of the Settled Land Act, 1925, as read with the definition of "personal representative" in section 117 (1) (xviii) of that Act; and see section 7 of the Administration of Estates Act, 1925, as to the chain of executorship. If the survivor of B and C appointed executors those executors will be the personal representatives of A, and as such they will be quali-

fied under section 30 (3) of the Settled Land Act to act as trustees of the settlement, their appointment being automatic.

If, however, such survivor appointed only one executor it will be necessary (in accordance with the express provision to that effect in section 30 (3)) for that executor to appoint another person to act with him as trustee for the purposes of the Settled Land Act, 1925.

Again, if the survivor of B and C did not appoint any executor, but a grant of administration to his estate has been taken out, the administrator(s) can appoint trustees of the settlement created by A's will for the purposes of the Settled Land Act: see sections 36 and 64 of the Trustee Act, 1925.

If no trustees can be found by any of these courses, then it should be possible to deal with the matter by a grant of administration with the will annexed to the estate of A. The administrator(s) will be the personal representative(s) of A within section 30 (3) of the Settled Land Act, 1925: see the definition in section 117 (1) (xviii) of that Act.

2. The tenant for life has no power of appointment of new trustees.
3. The assent was ineffective: see sections 6 and 8 of the Settled Land Act, 1925. By reason of section 13 of that Act until the necessary vesting assent has been made by the personal representatives of A, the tenant for life cannot sell or otherwise exercise his powers as tenant for life.
4. A grant of administration with the will annexed to the estate of A should be obtained and a vesting assent can then be made by the administrator, unless the last surviving executor himself appointed an executor of his will and such will has been proved: see above.
5. If an appointment of new trustees or of an additional trustee should be necessary it would appropriately be made before the Vesting Assent, I think. In that case the deed of declaration mentioned in section 35 of the Settled Land Act, 1925, will not be required. That point was decided by Clauson, J., in the unreported case of *Re Grinnell*, June 27, 1932: see Hood and Challis, *Property Statutes* (8th ed.), p. 443.

It will be noted that in the present case it is contemplated that a further grant to the estate of the testator A (with the will annexed) will be appropriate. It is possible that administration to the estate of the last surviving executor may have been taken out on his death intestate.

An inquiry might be made whether such a grant has, in fact, been taken out, and if so whether an appointment of new Settled Land Act trustees has been made under section 36 of the Trustee Act, 1925, by the administrator(s). If so, such an appointment would appear to be valid, and there is no need to look further for trustees. Moreover, in that event, there being already Settled Land Act trustees, section 30 (3) of that Act would not, it is submitted, constitute the subsequent grantee of administration with the will annexed to the estate of the testator A a trustee of the settlement for the purposes of the Settled Land Act, 1925. If, however, such an appointment has not been made, then the administrator with the will annexed to the estate of the testator A would qualify as automatic trustee of the settlement under section 30 (3) of the Settled Land Act, 1925. There remains the case in which the personal representatives of the last surviving trustee have not appointed new trustees but have assumed the functions of trustees pursuant to section 18 (above dealt with) of the Trustee Act, 1925. They cannot, however, continue to act in competition with such an administrator with the will annexed as above-mentioned, because section 18 enables them to exercise the function of trustees only "until the appointment of new trustees", and reasons have been advanced above for the view that personal representatives for the time being who become trustees by virtue of section 30 (3) of the Settled Land Act, 1925, can be said to be "appointed" trustees by that sub-section; and cf. *Re Routledge*, [1909] 1 Ch. 280. If by section 18 of the Trustees Act, 1925, the personal representatives of a sole or last surviving trustee were automatically constituted trustees themselves the point might be a much more doubtful one. So much for the answers to the five questions above posed.

Competition Between Personal Representatives

I have already ventured the opinion that, if successors in office of section 30 (3) trustees have been appointed, and are living when a grant *de bonis non* to the testator's estate is taken out, the grantee cannot claim to act as trustee in competition with duly appointed successors in office as trustees of the original personal representative trustees. That view may, or may not, be correct, and it seems very difficult to determine what happens if the matter is carried a step further. In order to state clearly the further stage which I have in mind it is perhaps better to give an example, as follows:—

A by his will creates a settlement of land and appoints B and C his executors. Upon A's death B and C prove the will. Both B and C die, but C the survivor, before he dies appoints an additional trustee D to act with him. It becomes necessary to take out a grant *de bonis non* to the estate of A, and E and F take out the grant. They are personal representatives of the testator and would be trustees of the settlement for the purposes of the Settled Land Act if D were dead, as there would be no such trustees apart from them, and they would hold office until other trustees were appointed.

If, however, D were living at the date of the grant, it has already been submitted that he would not be displaced by the grant. Further, if an appointment were made by D of an additional trustee G to act with him, it has been submitted above that such appointment would be valid. Suppose that D dies and then G dies and E and F are, or one of them is, still living. Apart from E and F, or one of them, there is no trustee of the settlement for the purposes of the Settled Land Act, 1925, and if they become, or one of them becomes, a trustee automatically at that stage by virtue of section 30 (3) of the Settled Land Act, 1925, they or he will remain a trustee until other trustees are appointed. If, then, G's personal representatives appoint new trustees under section 36 of the Trustee Act, 1925, does that appointment oust E or F, or the survivor of them?

It will be seen that both G's appointees and E and F must claim to be trustees by virtue of section 30 (3), but G's appointees must also plead in aid the provisions of the Trustee Act, 1925, s. 36, as read with section 64 of that Act, and section 33 of the Settled Land Act, 1925. On the other hand E and F need point only to section 30 (3) of the Settled Land Act, 1925. The solution of this impasse would seem to depend upon whether once personal representatives "for the time being" have been found, and have become trustees for the purposes of the Settled Land Act, 1925, and "successors in office" of those trustees (in their capacity as trustees, and not by succession to the office of personal representative), they are the persons qualified to act as Settled Land Act trustees of the settlement under section 30 (3) even if, meanwhile, someone else has become a personal representative of the testator settlor under a grant of administration *de bonis non* following the death of the original executor(s).

In *Re Thomas*, [1939] 1 All E. R. 379, the original executrix, having proved the will of her testator, died whilst entitled to act as trustee under section 30 (3), and a grant of administration with the will annexed issued to X. It was held that X as the personal

representative of the testator settlor was trustee for the purposes of the Settled Land Act, 1925, of the settlement created by the testator's will. It is therefore impossible to contend that no one but an original executor or administrator of the deceased can qualify as a Settled Land Act trustee under section 30 (3). However, in *Re Thomas* there was no suggestion either that the original sole executrix of the will had appointed another person to act with her as trustee, or that *her* personal representative was the person to appoint new Settled Land Act trustees, although letters of administration to her estate had been taken out. I therefore think that the better opinion is that an appointment of new trustees for the purposes of the Settled Land Act, 1925, could not effectively be made by the personal representatives of G, in the case above discussed, after the issue of a grant *de bonis non* at a time when no successors in office of the original executor trustees were living; and if the grantee(s) of the *de bonis non* grant died without appointing new trustees, I think that any new appointment of Settled Land Act trustees would appropriately be made by the personal representatives of that grantee and not by the personal representatives of G.

As a personal representative must at some time have completed his duties in that capacity, it may be suggested that when that stage is reached, his qualification to act as a Settled Land Act trustee ceases. That does not appear to be the position. Where a sole executor had already executed an assent in favour of the life tenant and completed his duties as personal representative, Russell, J., held in Chambers (*Law Journal Newspaper*, 1926, p. 436) that he could nevertheless act as Settled Land Act trustee and appoint an additional trustee to act with him.

I would add that as my own views upon some of the questions discussed in this article have fluctuated during its compilation any detailed criticism of the arguments advanced or the views expressed would be welcome. The number of cases in which appointments are made of new trustees of " the will " without any reference to " the purposes of the Settled Land Act, 1925 ", despite the creation of a Settled Land Act settlement by the testator's will, appear from my own experience to be considerable. When all the original executors have died and the survivor of them has died intestate such cases can be troublesome. If the position is simpler than it has appeared to me, I think that practitioners would be grateful for information leading to such a conclusion. My own conclusions should perhaps have been summarised; but the article is already somewhat lengthy.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Settlement—after-acquired property clause.—X was entitled to a life interest under the will of her father with a power of appointment in favour of her children with remainder in default in trust for her children. Her only child, in whose favour she had appointed, died an infant and intestate. As a result X became absolutely entitled to a moiety of the fund, and the question arose as to whether this moiety was caught by the after-acquired property clause of X's marriage settlement. These were the facts in *Re Rogers' Settlement,* [1951] 1 All E. R. 236. Harman, J., in deciding that the clause operated, distinguished *Re Benett-Stamford Settlement Trusts,* [1947] 1 All E. R. 888, noted *ante,* Vol. 12, p. 61, on the grounds that the interest vested there by will and not on intestacy. The interest in this case went from the son to X without having ever been in the settlement before and was therefore caught.

This, however, was not the case as regards the son's interest under X's marriage settlement, which had been appointed to him by his father, and which also in the events which happened, vested in X after her husband (the father) died. "It would be ridiculous," said Harman, J., "that property already in the settlement should come in the settlement again and go on the limitations of the settlement and so on in everlasting succession." He quoted in support Lord Macnaghten's words in *Mackenzie* v. *Allardes,* [1905] A. C. at p. 292.

The difficulty of drafting a properly limited after-acquired property clause has thus been demonstrated once again.

Nuisance—premises adjoining the highway—no right of entry or provision with regard to repairs.—The Court of Appeal have held that a right of entry will be implied in an agreement for a weekly tenancy in favour of the landlord where no stipulation is made with regard to it, and thus he will be liable for a private nuisance caused by lack of repair: *Mint* v. *Good,* [1950] 2 All E. R. 1159, following *Heap* v. *Ind Coope & Allsopp, Ltd.* [1940] 3 All E. R. 634.

Denning, L.J., doubted whether *in any case* a landlord could exempt himself from liability by a covenant (*Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, was, he thought, no longer good law). He pointed out that as in *Donoghue* v. *Stevenson,* the manufacturer is unable to relieve himself of liability in tort by contract with the wholesaler, so also should the landlord be unable to relieve himself of liability in private nuisance by contract with the tenant.

Mortgage—moneylender—whether claim under statutory trust maintainable—Law of Property Act, 1925, *s.* 105—*Moneylenders Act,* 1927, *s.* 13.—In *C. & M. Matthews, Ltd.* v. *Marsden Building Society,* [1951] 1 T. L. R. 441, second mortgagees, the plaintiffs, were moneylenders and sought by summons for the enforcement against the first mortgagees, the defendants, of the statutory trusts under section 105 of the Law of Property Act, 1925.

Harman, J., held that the claim failed and ordered that the balance of the money should be paid into Court as the mortgagor was dead and no representation had been taken out. The proceedings were, in effect, brought to enforce the security, although entitled " In the Matter of the Statutory Trusts declared by the Law of Property Act ", and the claim was barred by lapse of time under section 13 of the Moneylenders Act, 1927. The learned Judge distinguished *Re Thomson's Mortgage Trusts,* [1920] 1 Ch. 508, as in that case there was no doubt that the second mortgagee could give a good receipt for the surplus money, the only question was, how much could he take out of it ?

Loss of guest's property in yard or garage of public house.—The legal distinction between a common inn, where guests may rest for the night, and a public house where they may not, has received double attention recently from the Court of Appeal in *Williams* v. *Linnett,* [1951] 1 All E. R. 278, and *Tinsley* v. *Dudley,* [1951] 1 All E. R. 252. For in the former case, while the landlord of a common inn is liable to a " traveller " who merely calls in for a drink on the way home, for the loss of a car parked in an open space in front of the inn (being within the hospitium of the inn), the landlord of a public house is not liable to a similar person, even though in the latter case the vehicle is put under cover in a garage at the back.

Moreover, the landlord of an inn cannot relieve himself of liability by a notice placed in the car park (Denning, L.J., dissentiente). The landlord of a public house is only liable for a chattel when it is found that he had received possession and become a bailee of it. It is irrelevant as against him whether the guest was an invitee or licensee.

Jenkins, L.J., said in *Tinsley* v. *Dudley* : " Where the special and peculiarly stringent liability imposed on innkeepers, in the common law sense, is not in question, an obligation of that onerous character is not lightly to be inferred ".

NOTE

Re Duke of Northumberland, Halifax *v.* Northumberland, [1950] 2 All E. R. 1181.

Settled land—repairs—expenditure by tenant for life—recoupment out of capital moneys.—This decision by Vaisey, J., confirms the opinion given in an article on Agricultural Improvements by Tenants

for Life in *The Conveyancer* for March, 1950, and indeed goes somewhat further. Large sums had been spent by the tenant for life from 1945 onwards on repairs to (a) farms, farm cottages and market garden cottages, and (b) woodmen's cottages, cottages occupied by estate building department workmen and gamekeepers' cottages. The Court was asked to say whether payment could be made out of capital under section 73 (1) (iv) of the Settled Land Act, 1925, and section 81 (1) of the Agricultural Holdings Act, 1948. Section 73 (1) (iv) of the Settled Land Act states that capital money may be employed (*inter alia*) in payment as for an improvement authorised by the Settled Land Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1948, or any similar previous enactment or under custom or agreement or otherwise in or about the execution of any improvement comprised in Part I or Part II of the Third Schedule to the Agricultural Holdings Act, 1948.

It is clear that where the settled land forms an agricultural holding let to a tenant within the meaning of the Agricultural Holdings Act, 1948, money spent on certain defined agricultural improvements may be paid out of capital including repairs to fixed equipment, item 23 in Part II of the Third Schedule.

Vaisey, J., has in fact held that recoupment out of capital may be made not only in such cases, but also :—

(1) where the land is not let;
(2) where the land is let to someone during his continuance in an office held under the landlord;
(3) where the land (whether let or not) does not come within the definition of agricultural holding under the 1948 Act.

The decision in Case (1) is understandable in cases where the land if let would constitute an agricultural holding under the 1948 Act, but the extension to the other two seems to be doubtful. In arriving thereat the Judge appears to have isolated the definition of landlord in the 1948 Act from the other definitions such as agricultural holding, agriculture, fixed equipment and tenant. The definition of landlord is : " Any person for the time being entitled to receive the rents and profits of any land ". Isolated in this way landlord will cover the owner of anything which can be described as land and whether or not it is let. To take a practical example. The use of land for woodlands, unless ancillary to its use for other agricultural purposes, is not within the definition of agriculture under the 1948 Act, but the decision in this case will allow repairs to foresters' cottages to be paid out of capital moneys on an estate which is used solely for forestry purposes. From a practical point of view this may be very useful but it is difficult to bring it within the boundaries of the legislation. Does not the case show that a thorough review of the Settled Land Act code as to improvements is now due ? If repairs to agricultural property can be recouped out of capital moneys, why not repairs to residential or commercial properties ?

J. F. Mackeson.

2. *CHARITIES*

Hospital—gift to "found" a cot.—In *Re Ginger,* [1951] 1 All E. R. 422, a testator had bequeathed a sum of money "to found a cot in the Westminster Hospital in the memory of Godfree William Ginger". The Westminster Hospital had been designated as a teaching hospital and become one of a group of hospitals under the National Health Service Act, 1946, after the date of the will, but before death. Roxburgh, J., held that the expression "found a cot" constituted an endowment the income from which should maintain a bed in the hospital and that the case was so far covered by *Re Morgan's Will Trusts,* [1950] Ch. 673 (*ante,* Vol. 14, p. 304), that the hospital should allocate one of its existing beds to the bequest, because "found" did not necessarily mean establish something new: *Att.-Gen.* v. *Belgrave Hospital,* [1910] 1 Ch. 73. There was a further difficulty because the trustees of the bequest would have been given, under the old regulations of the Westminster Hospital, power to nominate patients for the bed so endowed and this was beyond the hospital authorities to allow under the Act. The learned Judge held that this change was irrelevant because there was nothing in the bequest itself about nomination.

It is worth notice that the order made by the learned Judge was to pay the money to the governors of the Westminster Hospital on their undertaking to name a cot in perpetuity in memory of Godfree William Ginger, to invest the money and apply the income for purposes relating to hospital services rendered by the Westminster Hospital at its present address "or such other place to which such hospital may be moved".

Hospital—gift over on nationalisation in favour of the Royal College of Surgeons.—In *Re Bland-Sutton's Will Trusts,* [1951] 1 All E. R. 494 (noted at first instance *ante,* Vol. 14, p. 305), the testator's attempt to defeat his bequest passing to the nationalised hospital board failed, because he inserted a void gift over. The Court of Appeal held that a condition dependent upon the words "become nationalised or by any means pass into public ownership" had become operative by virtue of the National Health Service Act, 1946. The condition was followed by a gift over in that event to the Royal College of Surgeons and it was held that the Royal College was not a charity, the gift over might take effect beyond the perpetuity rule, and was, therefore, void for remoteness, because a gift over to a non-charitable body limited after a charity is not protected by the exception to the perpetuity rule accorded to gifts over to a charity. Consequently, under the rule in *Lassence* v. *Tierney,* (1849) 1 Mac. & G. 551, the first gift was an absolute and not a conditional gift and the hospital took after all. This affirmed the decision of Danckwerts, J., but on other grounds.

The case is of importance on a number of grounds. The gift was to the Bland-Sutton Institute of Pathology at the Middlesex Hospital. The Court of Appeal reversing Danckwerts, J., held that, although the Medical School of the Middlesex Hospital was not nationalised,

the rest of the hospital, though physically part of the same entity, had become legally and administratively quite distinct and so nationalised under the Act. Furthermore, the Bland-Sutton Institute really remained part of the Medical School, but that did not prevent the Court from holding that, as the hospital was nationalised though the school was not, the condition nevertheless took effect.

Danckwerts, J., had held that the Royal College of Surgeons was a charity notwithstanding the decision in *Re Royal College of Surgeons,* [1899] 1 Q. B. 871, but the Court of Appeal reversed this decision on the ground that it was not open to that Court to disregard the earlier Court of Appeal decision: see *Young* v. *Bristol Aeroplane Co.,* [1944] K. B. 718. The earlier decision held that the college was not charitable because it had two primary purposes one of which, the promotion of the interests of those practising surgery, was not charitable. The reasoning of Danckwerts, J., that the earlier decision was limited to the particular statutory provisions and that the position of the college was *in pari materia* to that of the Institution of Civil Engineers was not accepted.

Hospital—legacy to be "added to invested funds".—In *Re Meyers,* [1951] 1 All E. R. 538, legacies were given to a number of named hospitals, some incorporated and others not, with a direction that the money should be added to their invested funds and not be treated as income. Owing to the 1946 Act, these hospitals had no invested funds. Harman, J., held that the requirement of invested funds was not a condition precedent and, although the incorporated bodies still remained, the legacies were to be paid to the respective boards of governors responsible for the hospitals named and not to the corporations. The learned Judge arrived at this result (notwithstanding *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children,* [1915] A. C. 207) on the ground that, where the hospital was not incorporated the legacy was thereby a gift for the work of the hospital, and the fact that in some cases the correct name of a corporation was used did not alter the character of the gift. Since in every case it was to be treated as a gift for the purposes of the hospital the proper authority to receive the gift was the board constituted under the 1946 Act. It is respectfully suggested that if this decision is to be followed it will raise almost as many difficulties as it settles. The funds at the disposal of a voluntary hospital before 1946 had purposes which in effect no longer exist, namely, to provide treatment for those for whom there was no other source of payment. It is submitted that this was the ground, namely, relief of poverty, on which hospitals came to be treated as charitable and it is difficult to see how this still applies under the Health Service. Consequent difficulties arise from changed objects and other grounds for lapse. So far the cases have tended to treat the new hospital boards as virtually equivalent to any hospital that they may control.

Hospital—home of rest for nurses—benefit to the community.—Re White's Will Trusts, [1951] 1 All E. R. 528, arose out of a gift of income in trust for the Royal Infirmary Sheffield for the purposes of a home of rest for nurses. Harman, J., held that, notwithstanding that the Royal Infirmary was now part of a group of hospitals, the fund was payable to the board of the group, but with a direction that the fund should " so far as practicable " be applied to that particular hospital.

The principal difficulty felt in the case was whether a rest home for nurses was charitable and the learned Judge came to the conclusion that it was on the ground that its true object was to provide for the relief of sickness and was, therefore, charitable. Its purpose was to increase the efficiency of the Royal Infirmary, and the learned Judge continued: " Nobody doubts that that institution is a charity carrying on the charitable work of healing the sick ".

It should, however, be pointed out that earlier the learned Judge had himself said (at p. 529): " a home for millionaires, I cannot think . . . , would be a charity ". But he did not explain whether the relief of sick millionaires would be a charitable work. This point will have to be faced, because if the relief of sickness as such is charitable, then there seems no justification for excluding nursing homes not within the National Health Service from the scope of charity. After all the benefit to the community is not less even though the patient has to pay for his treatment and if the cost can be reduced by treating the case as one of charity there is something to be said further in favour of its being for the benefit of the community.

Fire brigade—benefit to the community.—In *Re Wokingham Fire Brigade Trusts,* [1951] 1 All E. R. 454, a fund had been created by the sale of equipment of a fire brigade; this equipment having been purchased out of moneys subscribed many years before. Danckwerts, J., held that the fund was held for charitable purposes and was to be applied *cy près,* the matter going to Chambers for the settlement of a scheme. He said (at p. 456): " It (the brigade) was formed to supply a public need, namely, to provide a means of fighting fires in the Wokingham district. That seems to me a public purpose. . . . The provision of a public fire brigade of this kind is as much a public charitable purpose as the provision of a life-boat, and the provision of a life-boat has been held in one way and another in a number of cases to be a public charitable purpose ".

It must, however, be borne in mind that not all " public " purposes are charitable: *Blair* v. *Duncan,* [1902] A. C. 37, any more than trusts for the public benefit are necessarily charitable. It is difficult to say how this case particularly fits into the charitable category but that is not to suggest that the gift is other than charitable.

Non-charitable object—welfare benefit or assistance of members of H.M. Navy (past or present).—Re Meyers, [1951] 1 All E. R. 538, gives point to the observations in the last note. One third of the

residue of the testator's estate was to be held upon trust " for such charitable or benevolent institution or institutions fund or funds having as its or their object the welfare, benefit or assistance of members of H.M. Navy (whether past, present or future) or their wives or children " as the executors should think fit. Harman, J., held that as the fund could be applied to past members of the Navy, etc., it was not a good charitable trust and, as it was intended to benefit an unidentifiable class of persons, it was void for uncertainty.

The use of the words " or benevolent " had prevented the institutions from being necessarily charitable: *Chichester Diocesan Fund* v. *Simpson,* [1944] A. C. 341; and a gift for the ex-members of the forces as such was not a good charitable gift: *Re Good,* [1905] 2 Ch. 60; although benefiting serving soldiers is good as a charity: *Re Good* (*supra*). It is respectfully submitted that this is a clear example of a case where the testator's manifest intention has gone adrift since the words " welfare, benefit or assistance " suggest very strongly the question of " need " which is behind a general notion of charity.

---

3. *PLANNING CASES*

Pre-Act contravention — enforcement notice. — In *Higham* v. *Havant U. D. C.,* 1 P. & C. R. 281, a Divisional Court affirmed in effect the decision in *Kendall* v. *Robinson,* 1 P. & C. R. 211 (noted *ante,* Vol. 14, p. 400*j*) that an enforcement notice can be served within three years from the Appointed Day (July 1, 1948), notwithstanding that the contravention took place some years before the Act came into force. This, of course, can only apply when it remained a contravention on the Appointed Day, but it must be recalled that the Town and Country Planning (Interim Development) Act, 1943, clamped down on all development without planning permission, but, in fact, this restriction was not observed as carefully as it might have been.

The facts of the case were not without interest as illustrating the pitfalls of development. Here the occupier had applied under the Housing Act, 1936, for a licence to use the land for caravans and it was held that notwithstanding that the local housing authority was also the local planning authority the licence under the Housing Act did not constitute a planning permission and the use for caravans was, therefore, a planning contravention.

Certiorari to an inferior tribunal.—Having regard to the fact that planning tribunals state the reasons for their orders it is important to note that in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw,* 1 P. & C. R. 288, a Divisional Court has held that it has jurisdiction to issue and quash an order where it is a " speaking order ", that is, an order giving reasons. This can, of course, only be done when the Court finds that the reasons are wrong in law, and the

Court cannot substitute the correct order. In other words it is not a form of appeal, but it may operate to prevent a wrong order being enforced. The point is significant, of course, only where no appeal lies to a Court of law as is now increasingly the case.

Development—increase in area.—A decision of the West Kent Quarter Sessions Appeals Committee (Chairman: G. A. Thesiger, K.C.) on development is an interesting illustration of the difficulty of keeping some forms of "development" within planning bounds. In *W. S. Wright, Ltd.* v. *Bromley Corporation,* 1 P. & C. R. 30, the local authority had issued an enforcement notice on the ground that a tip had been extended in superficial area from that which required no permission. The Appeals Committee dismissed the appeal on the ground that they were not satisfied that the superficial area which had existed before the Appointed Day had not been extended and hence required planning permission. It is to be noted that when there is *prima facie* development the onus appears to be on the developer to show that permission is not required.

---

4. *WILL CASES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Family provision—evidence of reasons for disinheriting dehors the will.—Re Smallwood, [1951] 1 All E. R. 372; 1 T. L. R. 331. Section 1 (7) of the Inheritance (Family Provision) Act of 1938 permits the Court to consider such evidence of the testator's reasons for making no provision for a dependant as it considers sufficient. Roxburgh, J., felt that, had there been no authority, he would have limited evidence to evidence having some connection with the will. But he felt bound to follow *Re Vrint,* [1940] Ch. 920, where evidence in maintenance proceedings, *i.e.*, reasons given by the testator *alio intuitu,* were admissible to justify a disinheritance. In the instant case oral evidence was therefore admitted of complaints made by the testator to his son against the applicant for provision. The effect is, therefore, that "reasons" for disinheriting may be shown from the general relationship of testator and applicant and not merely from the terms or circumstances of the will.

(Theobald 76.)

Will—referential trusts—lapse by referential legatee not surviving testator—not extended to notional pre-decease.—Re Wray, [1951] 1 All E. R. 375 (C. A.). There is a much criticised rule, in *Re Cousens,* [1937] Ch. 381, that a legatee taking under a referential

trust must himself still survive the original testator. In the present case Hetty appointed Charles and Gladys her executor and executrix and left her residuary estate to pass under the will of Charles. Charles, in his own will, conferred a life interest on Gladys. Hetty later executed a codicil directing that Gladys should not be her executrix and that all references to Gladys in Hetty's will be struck out, as if Gladys were dead. Gladys in fact survived Hetty and Charles. The Court of Appeal held that the only way Gladys would lose her referential gift would be by clear evidence that Hetty meant Gladys to forfeit any legacy. That Hetty was not trying to invoke the technical doctrine of lapse in this roundabout way was supported by the fact that she left an additional legacy to Gladys in the codicil, and, had she meant Gladys to be treated as pre-deceasing her, this would have been a nullity. There was no evidence that Hetty knew that Charles was leaving his own property to Gladys, so she could hardly have intended Gladys to forfeit any interest under that will. *Re Freeman,* [1910] 1 Ch. 681, and *Re Percival* (1888), 59 L. T. 21, were followed.

It may be noted that 2 K. & E. 1023, note "f", raises the problem of accidental revocation of legacies to executors, and warns against using too wide a phrase. If the alteration of an executor is the sole object of the change, the revocation should be limited specifically to the executorship, and legacies to such executor ought to be saved. The form "as if he were dead" seems undesirable. Even the form "in all respects" may be dangerous. The draftsman of a will would do well to avoid using phrases which will require to be aided by litigation.

(Theobald 528, 558.)

Will — construction — "casus omissus" — limitations of rule in Jones v. *Westcomb* (1711), Prec. Ch. 316; *Re Bailey,* [1951] 1 All E. R. 391 (C. A.).—The essence of the rule in *Jones* v. *Westcomb* is that one contingency necessarily implies another, *e.g.,* a gift over if A.'s children die under twenty-one will operate if A. dies childless, since the birth of A.'s children is a pre-condition of their attaining any particular age. But the rule cannot be applied if no such necessary implication can be made out, even if the presumed intention of the testator to cover the case is probable. In the instant case residue was left to M. if she survived E., but to G. if M. predeceased E. M. in fact survived E. but died before the testatrix, so that her interest lapsed. The Court of Appeal held that G. could not take this lapsed gift. G. was expressly to take only if M. predeceased E., which had not happened. The testatrix probably did not advert to the possibility of surviving M. herself. What provision she might have made was conjectural. That M. should survive the testatrix was in no sense implied from the actual provisions made, and M. could survive the testatrix but die before E., or survive E., as had happened, without surviving the testatrix. There was no way in which to link up these parallel possibilities. To give the property to G. would, in fact, contradict the terms of the will. The testatrix had known that M. was dead for some time before her own death, and had made no

codicil on the point. The Court followed *Brookman* v. *Smith* (1872), L. R. 7 Ex. 271, and approved *Re Graham,* [1929] 2 Ch. 127.

This decision emphasises the fact that a testator usually assumes that his legatees will survive him, as they are commonly younger than he is. In drafting a will the draftsman should be especially careful to raise this point and warn of the dangers of lapse in gifts other than those to issue.

(Theobald 458.)

Will—construction—date of ascertainment of class.—Re Bleckly, [1951] 1 T. L. R. 432. In a class gift it is not possible to determine the minimum share any member may take until all possible members of the class are in existence. In order to determine the actual sums it is necessary to wait until all such members satisfy the conditions, if any, or die without satisfying them. A very long time may elapse before the minimum share is determined, and a member who is in existence and has satisfied the condition cannot safely be given anything. Hence the Courts have adopted a rule of convenience to shorten the delay and taken some date rather arbitrarily as the date when all members of the class must be in existence if they are to take (*Andrews* v. *Partington* (1791), 3 Bro. C. C. 401). But this defeats the donor's intentions. In the present case Harman, J., refused to extend the *Partington* rule to slightly new circumstances. A legacy was made to the children of H. who should attain the age of twenty-one. H. had one child, aged twenty-one, and no other children as yet. It was held that this child must wait until H.'s death before taking the gift. The fact that she had already qualified did not prevent the class opening up to admit further children as possible members of this class.

(Theobald 235.)

Will—construction—"issue of marriage" not a technical expression.—Re Noad, [1951] 1 All E. R. 467. A testator, after a life interest to his widow, gave his property to the "issue of our marriage". It was held that this was a gift to children only, and not to grandchildren, so that grandchildren could not claim to take under it *per capita* or under an independent title. "Issue" by itself would extend to grandchildren, but "issue of the marriage" is not a term of art and should be construed in a popular sense. A grandchild is issue of a grandparent, but not strictly issue of their marriage, but of the marriage of its own parents. The distinction is somewhat similar to the common law distinction between *causa causans* and *causa sine qua non.* The marriage of the grandparents was the *causa sine qua non* of the eventual birth of grandchildren, but the marriage of the parents was the *causa causans.* In this case the testator had left one son, who had three children. Roxburgh, J., held that the son took all, and need not share with his children.

(Theobald 244.)

5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—shop and dwelling-house let to same tenant by two separate tenancies—shop outside Acts.—The interest of *Cumbes* v. *Robinson* (*No.* 2), [1951] W. N. 146, is that it approves *Phillips* v. *Hallahan,* [1925] 1 K. B. 756, a decision upon which some doubt has been thrown because the Court did not there consider the provisions relating to premises " let together with " a house; see also the comments on p. 34 of the Interim Report of the Leasehold Committee (1949, Cmd. 7706). It seems now clear that if a shop and dwelling-house which were formerly combined in one tenancy subject to the Rent Restrictions Acts are by agreement let to the same tenant by two separate tenancies, the shop will be taken out of the Acts. There will be a problem of apportionment to be solved—the original rent which covered both the shop and the dwelling-house will require apportionment in relation to the dwelling-house. The shop rent will become free from control. It is submitted that this decision is not entirely satisfactory.

(Rent Restrictions Guide, 3rd ed., pp. 9, 25.)

Rent Restrictions Acts—letting for business purposes does not determine standard rent—lease and not actual user determining factor.—The case of *Court* v. *Robinson,* [1951] 1 All E. R. 209, illustrates neatly the two propositions:—(a) a letting for business purposes does not determine the standard rent; (b) whether a letting is for business purposes is decided by the terms of the letting, not by the actual user, unless it can be inferred that the original contract has been superseded by a new contract providing for a change of user. In *Court* v. *Robinson* the letting was for a working men's social club (*i.e.,* a non-residential use) and the knowledge by the landlord's rent collector that the premises had been used to some extent as a residence failed to establish a new contract for a residential use: cf. *Wolfe* v. *Hogan,* [1949] 2 K. B. 194.

(Rent Restrictions Guide, 3rd ed., p. 23.)

Rent Restrictions Acts—suitability of alternative accommodation—reasonableness—Judge's wide discretion.—In *Creswell* v. *Hodgson,* [1951] 1 T. L. R. 414, it has been held that in considering the question of reasonableness in an alternative accommodation case the County Court Judge may properly take into account (1) the fact that the landlord's motive is to recover a house which he may sell free from the selling price control imposed by the Building Materials and Housing Act, 1945 (the alternative accommodation offered being subject to such control), and (2) the fact that the proffered accommodation, although suitable, is only just suitable and that the decision as to suitability is a " knife-edge " one.

(Rent Restrictions Guide, 3rd ed., pp. 81, 83–85.)

Furnished Houses (Rent Control) Act, 1946—*notice to quit after reference to tribunal—effect of section* 5.—In *Alexander* v. *Springate,* [1951] 1 All E. R. 351, Streatfeild, J., decided, contrary to the opinion expressed in Megarry's *Rent Acts* (5th ed.), p. 89, that the effect of section 5 of the Furnished Houses (Rent Control) Act, 1946, is to postpone the operation of a notice to quit until the end of the three months' period mentioned in the section, not to render the notice a nullity. This decision is in accordance with the implication contained in section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, although hardly the more natural interpretation of the provision in section 5 of the 1946 Act.

(Rent Restrictions Guide, 3rd ed., p. 98.)

Landlord and Tenant (Rent Control) Act, 1949—*premium lawfully required before Act—effect of demand for instalment after Act—relevance of proviso for re-entry—no illegality.*—It was held in *Regor Estates, Ltd.* v. *Wright,* [1951] 1 All E. R. 219, that where a premium had been lawfully required in 1948 for the grant of a tenancy, before the Landlord and Tenant (Rent Control) Act, 1949, was in force, a demand for an instalment of the premium, made after the Act was in force, was not rendered illegal by the Act, despite the fact that there was a proviso for re-entry in the lease applicable *inter alia* to the non-payment of the instalments of the premium. The existence of this proviso did not make the demand for an instalment the requiring of a premium as a condition of the continuance of the tenancy. Cohen, L.J., was a little ambiguous as to whether the fact that there was no threat to enforce the proviso was material. The real ground seems to be that the requiring of the premium was an act done before 1949. The demand for the instalments merely gave effect to the original agreement, which was valid when made and not retrospectively invalidated by the Act.

(Rent Restrictions Guide, 3rd ed., pp. 73–77.)

Landlord and Tenant (Rent Control) Act, 1949—*jurisdiction of tribunal—power to inquire into genuineness of agreement purporting to create an unfurnished tenancy.*—The importance of *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek,* [1951] 1 All E. R. 482, is its repudiation of the doctrine implicit in *R.* v. *Hackney, Islington and Stoke Newington Rent Tribunal, ex p. Keats,* [1950] 2 All E. R. 138, that a rent tribunal has no power to inquire into the genuineness of an agreement upon which its jurisdiction depends. The actual decision in *Keats's Case* is approved, since there was no evidence there upon which the tribunal could properly hold that the agreement creating a business tenancy was a sham, but it is now made clear that a tribunal is not precluded from inquiring whether a document put before it is a *bona fide* agreement or not. The Divisional Court in *Zerek's Case* considered that a document which was alleged to create a furnished tenancy, thus ousting the tribunal's jurisdiction, was a mere sham, and refused an order for *certiorari.*

Devlin, J., in an interesting judgment discusses the principles of *certiorari,* but leaves somewhat unclarified the extent to which tribunals may inquire into the validity of agreements, where difficult questions, such as allegations of lack of true consent, fraud or forgery are involved. He suggests that there may be power to restrain tribunals from considering questions which are appropriate for decision by the Courts, requiring proper pleading, discovery and the testing of sworn evidence by cross-examination. In the present case, however, no such difficulties arose, as the document put forward was plainly bogus.

(Rent Restrictions Guide, 3rd ed., pp. 66–70.)

Covenant not to assign without consent—withholding of consent not to be deemed to be unreasonable in certain circumstances—invalidity. —Quite a number of leases contain a provision of the kind which the Court of Appeal have pronounced invalid in *Re Smith's Lease,* [1951] 1 All E. R. 346; [1951] W. N. 51. This is a provision that consent to an assignment or sub-letting is not to be deemed to be unreasonably refused if the lessor offers to accept a surrender and makes the lessee opt either to withdraw his application for consent to assign or underlet or surrender the tenancy. This stipulation is in conflict with section 19 (1) (*a*) of the Landlord and Tenant Act, 1927, and for that reason cannot stand.

(Woodfall, 24th ed., p. 582.)

Covenant not to sub-let—effect of sub-letting part of premises.— Perhaps few conveyancers need the reminder given by *Cook* v. *Shoesmith,* [1951] W. N. 24, of the importance of the words " or any part thereof " in a covenant against sub-letting. The principle that a covenant not to sub-let " the premises " without the addition of these words is not broken by the sub-letting of a part of the premises can be traced back to Lord Eldon's *dictum* in *Church* v. *Brown* (1808), 15 Ves. 258, at p. 265, and was applied in *Grove* v. *Portal,* [1902] 1 Ch. 727. In *Cook* v. *Shoesmith,* the precise point was decided in accordance with these authorities.

(Woodfall, 24th ed., p. 588.)

Waiver of covenant not to sub-let without consent—effect on covenant not to use except as a private dwelling-house.—In *Downie* v. *Turner,* [1951] 1 T. L. R. 217, the Court of Appeal held that, assuming that the sub-letting of part of a dwelling-house (in breach of a covenant not to sub-let without consent) constituted a breach of a covenant not to use except as a private dwelling-house (which the Court doubted), the waiver by the landlord of the breach of the former covenant must be taken to amount to a waiver of the breach of the latter as well; the breach of the covenant in regard to sub-letting necessarily constituted also (as the above assumption) a breach of the covenant in

regard to user as long as the sub-tenancy lasted. In drafting leases the inter-relation of these two covenants should be kept in mind. In some leases the restrictions on user reduce the covenant in regard to assignment with consent to a nullity.

(Woodfall, 24th ed., p. 592.)

---

6. *FAMILY LAW CASES*

By C. E. P. Davies, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

Divorce—husband granted decree on ground of wife's cruelty—wife's right to maintenance.—The Court has usually been reluctant to allow maintenance to a wife guilty of misconduct (see *Robertson* v. *Robertson* (1889), 8 P. D. 94) and has considered that in such a case a compassionate allowance sufficient to save her from destitution would be more appropriate (see *Sifton* v. *Sifton,* [1939] P. 221), though power to order maintenance in such a case was given by the Judicature Act, 1925, s. 190 (2) (now Matrimonial Causes Act, 1950, s. 19 (3)). But in *Trestain* v. *Trestain,* [1950] P. 198, where the husband petitioner had obtained a decree against his wife on the ground of cruelty, discretion being exercised in respect of his own adultery, and the wife's appeal was dismissed, Denning, L.J., referring to *Ashcroft* v. *Ashcroft,* [1902] P. 270, said that the form of the decree was not conclusive and that if, upon an investigation of the facts, it appeared that the wife had been less blameworthy than her husband, she was entitled to apply for maintenance, though a decree had been pronounced against her, as fully as if a decree had been pronounced in her favour.

(Latey, p. 213; Tolstoy, p. 113.)

Nullity—polygamous union—husband domiciled in Egypt—wife resident in England for three years immediately preceding commencement of proceedings—Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) and (2) (now Matrimonial Causes Act, 1950, s. 18 (1) (b)).—In *Risk* v. *Risk,* [1950] 2 All E. R. 973, the petitioner, a domiciled Englishwoman, married in 1939 at Alexandria a Moslem domiciled in Egypt. The marriage contract enabled the husband to have four wives simultaneously, but the marriage was in fact monogamous. The parties lived together in Egypt until 1946, when the wife left her husband because of his cruelty and returned to England. In April, 1950, she presented a petition to have the marriage declared void on the ground that she was a domiciled Englishwoman at the time of the marriage and therefore incapable of contracting a valid polygamous marriage. The principle had been established in *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130, that the machinery of the English matrimonial law could not be used to dissolve a polygamous union and

the concluding words in the judgment of Lord Penzance in that case formulated the rule and indicated some of its limitations: "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanctions of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England" (at p. 138). In the present case it was argued that *Hyde* v. *Hyde* was not applicable because the machinery of the Court was not being invoked to dissolve a polygamous union, or to pronounce one voidable, but to declare there had never been a valid marriage. But Barnard, J., declined to accept this distinction and said that the word "adjudication" used by Lord Penzance was wide enough to include a petition for a marriage to be declared void.

(Latey, p. 10.)

Divorce—husband's cruelty and constructive desertion—husband domiciled in Canada—whether wife ordinarily resident in England during this period.—In *Hopkins* v. *Hopkins,* [1950] 2 All E. R. 1035, a wife presented a petition for divorce on the ground of cruelty and constructive desertion against her husband who was domiciled in Canada, relying upon section 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act, 1949 (now Matrimonial Causes Act, 1950, s. 18 (1) (*b*)), which gives the Court jurisdiction in such a case if the wife is resident in England and has been *ordinarily resident* there for three years immediately preceding commencement of the proceedings. The parties were married in England in 1943, where the wife lived continuously until April, 1949. The husband lived with his wife until February, 1949, but then migrated to Canada and in April, 1949, took his wife there where they lived together in a furnished house until September, 1949. The wife then returned to England alone and filed a petition for divorce in October. Thus for thirty-one months of the thirty-six immediately preceding commencement of the proceedings the wife had lived in England. In *Levene* v. *Inland Revenue Commissioners,* [1928] A. C. 217, Cave, L.C., expressed the opinion that ordinary residence, for the purpose of the Income Tax Acts at least, meant residence in a place with some degree of continuity; and also that there was no substantial difference between this and mere residence. In the present case, Pilcher, J., adopted this view and held that, on the particular facts, Mrs. Hopkins was ordinarily resident in Canada from April to September, 1949, and was not ordinarily resident in England for that period, so was not ordinarily resident in England for the three years immediately preceding commencement of the proceedings. The Judge was careful to point out, however, that this was not a case in which the wife had at the same time two physical residences; during her five months in Canada she had given up residence in England. If she had in fact had residences in Canada and in England during those months she might well have been held to have been ordinarily resident in England

during the whole of the three years on the authority of *Re Norris* (1888), 4 T. L. R. 452, where Lord Halsbury, L.C., expressed the view in a bankruptcy case that a person could have residences in more than one country at the same time.

Guardianship of infants—right of father to dictate his child's religion.—The common law before the Guardianship of Infants Act, 1925, was that, save in the most exceptional circumstances, a father had the right to prescribe the religious faith in which his children should be brought up, and this principle was applicable after his death (*Hawkesworth* v. *Hawkesworth* (1871), 6 Ch. App. 539). But long before 1925 it had been generally recognised that strict application of the principle might cause severe hardship to infants and accordingly section 1 of the Guardianship of Infants Act, 1925, provided that where in any proceedings before any Court the custody or upbringing of an infant was in question the welfare of the infant should be the paramount consideration. In *Re Collins,* [1950] 1 Ch. 498, the issue as to the guardianship and religious upbringing of an infant arose between the child's paternal and maternal grandparents, the father and mother both being dead. Counsel argued that the operation of the section should be restricted to cases where there was a direct issue between the mother and father, leaving the common law principle applicable if the mother and father were dead. But the Court of Appeal held that the Act applied even in such circumstances to the exclusion of the common law rule.

Divorce—adultery—360 days non-access immediately preceding birth of child.—In *Preston-Jones* v. *Preston-Jones,* [1951] 1 All E. R. 124, a husband petitioned for divorce on the ground of his wife's adultery. The only evidence of adultery was that a child was born to the wife on August 13, 1946, the husband having been absent from the United Kingdom on military service from August 17, 1945 until February 9, 1946. The child was normal at birth, so could not have been conceived after February 9, 1946. There was medical evidence of this and also that the normal period of gestation was 280 days, to which twenty days might be added. At the hearing in the Court of Appeal Denning, L.J., (dissenting), took the view that from evidence that the husband had not had access to his wife for 360 days immediately preceding birth of a normal child the Court might draw an inference that the child had been conceived in adultery which could only be rebutted by direct medical evidence to the contrary. But the majority of the House of Lords (Lord Morton of Henryton dissenting), while expressing sympathy with this view, were unable to accept it; in previous cases the Courts had held that periods of gestation were possible lasting for 331 days (*Gaskill* v. *Gaskill,* [1921] P. 425), 346 days (*Wood* v. *Wood,* [1947] P. 103) and 349 days (*Hadlum* v. *Hadlum,* [1949] P. 197) and the House felt reluctant to decide that a further period of eleven days, making 360 days in all, made the vital difference that the Court could after lapse

of such a time presume that adultery had occurred. The issue of principle in this case was, therefore, what degree of general acceptance was required to constitute the common knowledge necessary to give rise to the presumption. There was no doubt about the normal period of gestation which had previously been taken judicial notice of at 270–275 days (*Bosvile* v. *Att.-Gen.* (1887), 12 P. D. 177) and 273–280 days (*Burnaby* v. *Baillie* (1889), 42 Ch. D. 296); the difficulty arose over the conflicting medical evidence in previous cases concerning the further period which might elapse between coitus and fertilisation. No medical witness had ever said that 360 days in all from coitus to conception was possible, but it had been said in *Hadlum* v. *Hadlum* that 349 days was possible and in *M. T.* v. *M. T.*, [1949] P. 331, that 340 days was impossible, and on account of this disagreement among medical experts the House of Lords considered that common knowledge was not sufficiently certain to enable adultery to be presumed after 360 days non-access immediately preceding birth of a child. But Lord Morton of Henryton, agreeing with Denning, L.J., in the Court below, said (at p. 136): " In my opinion the Court is entitled to take judicial notice of the fact that the normal period from fruitful coitus to birth does not exceed 280 days. That is one of the ordinary facts of nature as to which no evidence is required. If a husband proves that a child has been born 360 days after he last had an opportunity of intercourse with his wife and that the birth was a normal one, and if no expert evidence is called by either side, I am of opinion that the husband has proved his case beyond reasonable doubt ".

It is interesting that, since the case was decided, a report has been published of a survey undertaken by the Department of Social Medicine in the University of Birmingham covering particulars of 24,000 births in Birmingham in 1947 and that the report records two births after a pregnancy lasting for 357 days. This evidence goes far to justify what has been thought by some to be excessive caution in declining to allow the inference of adultery to be drawn. On the facts, the House of Lords held (Lord Oaksey dissenting) that the medical evidence was sufficient to justify a finding that the wife had committed adultery, and allowed the appeal.

(Latey, p. 342; Tolstoy, p. 28.)

Divorce—Desertion—Whether period of desertion interrupted by resumption of sexual intercourse.—Whitney v. *Whitney*, [1951] 1 All E. R. 301, was a petition for divorce on the ground of desertion. The wife had left her husband in December, 1945, but he had gone to visit her three or four times at week-ends in 1946, for Easter, 1947, and again during August of that year, and during those times marital intercourse took place between them. In *Mummery* v. *Mummery*, [1942] P. 107, it had been decided that intercourse on one occasion was not in itself inconsistent with continuing desertion, but the principle of that decision was that desertion once commenced could only be terminated by the parties resuming a matrimonial home together. The same principle had also been applied to different facts in *Bartram* v. *Bartram*, [1950] P. 1, where the Court decided that desertion by a wife was not terminated merely because she had

returned to live in the same house as her husband, though in that case there was no question of resumption of sexual relations between them. Applying the same rule in the present case, Willmer, J., decided that mere resumption of marital relations between the parties in 1946 and 1947 did not itself terminate the wife's desertion, which had commenced in 1945, and granted the husband a decree.

(Latey, pp. 111 and 126; Tolstoy, p. 50.)

---

7. *REVENUE CASES*

By Desmond Miller, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A. T. C.) or *Taxation Reports* (T. R.).

(a) Income Tax

Goodwin v. *Brewster*, [1951] T. R. 1 (C. A.).

The judgment of Danckwerts, J., was unanimously affirmed by the Court of Appeal, who refused leave to appeal to the House of Lords.

(For report of proceedings in the Chancery Division, see *The Conveyancer*, Vol. 15, No. 1 at p. 64.)

Harrison v. *Lilley*, [1951] T. R. 11; 44 R. & I. T. 191 (C. A.).

(1) *Statutory provisions*: Cases IV and V of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The decision in this case rests entirely on the specialties of the contract existing between the interested parties. It is none the less of great importance in considering the effect of any bargain resulting in payments to be made as a consideration for the release of accrued income rights.

(3) *Facts and Decision*: The respondent taxpayer, Vera Lilley, held second mortgage bonds issued by an American corporation to the value of 100,000 United States dollars; the bonds carried interest at 6 per cent. per annum subject however to the condition that so long as principal or interest due on prior bond issues remained unpaid nothing, whether by way of principal or interest, should be payable to the second bond-holders.

By December, 1942, arrears of interest on the taxpayer's bonds amounted to approximately 36,000 dollars.

The American corporation was desirous of selling the property upon which the first and second bonds were secured. For this purpose it was necessary that the second mortgage bonds should be cancelled and the terms of the corporation's offer to the taxpayer were therefore as follows:—

(a) subject to cancellation the corporation would issue to the taxpayer a five-year promissory note for 100,000 dollars (with certain securities); and

(b) the corporation also proposed "paying balance of interest on second mortgage bonds half June first 1943, and half June first 1944".

The offer was effectively accepted; the bonds were cancelled as at December 31, 1942, and the promissory note issued.

Pursuant to the contract so made the sterling equivalent of some 18,000 dollars (subject to the deduction of certain American taxes), *viz.*, £3,000, was paid to the taxpayer on June 1, 1943 and 1944, respectively. Assessment for the years 1943–44 and 1944–45 was made on the taxpayer in these several amounts on the alternative grounds that they represented either income from a foreign security, *i.e.*, the mortgage bonds, or income from a foreign possession, *i.e.*, the contract.

The respondent taxpayer maintained that in so far as these amounts were referable to the bonds she did not possess the relevant source of income during the years of assessment, in so far as referable to the contract the same had no income quality, being paid to her as consideration for the cancellation of rights previously existing.

Held, affirming the Special Commissioners, determination and reversing the judgment of Danckwerts, J.:—

(a) that the terms of contract (made in 1942) incorporated the terms of the second mortgage bonds to the extent necessary to define and quantify the interest therein promised to be paid;

(b) that notwithstanding the cancellation of the bonds the right to receive the interest in arrear (pursuant to those bonds) was therefore preserved by contract;

(c) that as a further consequence the sums so paid retained the character of interest arising out of or under the second mortgage bonds;

(d) that as the taxpayer possessed the source of income, *viz.*, the contract under which it was in fact paid, during the relevant years she was properly assessed pursuant to Case V of Schedule D, *supra.*

(Leave to appeal to the House of Lords granted.)

(b) Estate Duty

Re D'Avigdor Goldsmid's Life Policy; *D'Avigdor Goldsmid* v. *C. I. R.*, [1951] 1 All E. R. 240; 44 R. & I. T. 157 (Ch. D.).

(1) *Statutory provisions*: Section 2 (1) (*c*) and 2 (1) (*d*), the Finance Act, 1894; section 30 (1), the Finance Act, 1939.

(2) *Point*: In the case of a policy which was originally the property of the deceased and is subsequently assigned by him there can be no keeping up for the benefit of a donee until a donee is created (*e.g.*, by assignment). When a policy is sold or given away the property so assigned is the benefit of the contract with the insurance company, not the moneys payable thereunder.

(3) *Facts and Decision*: The deceased in 1904 effected a policy of assurance on his life and for his own benefit. In 1907 he married and by ante-nuptial settlement (*inter alia*) the policy was settled by him. Under the limitations of trust a protected life interest was reserved to the deceased and subject thereto and to a rent charge in favour of his wife, the settled property was limited to the first and other sons of the marriage in tail male. The deceased covenanted to pay the premiums on the policy as they fell due.

In 1928, by private Act of Parliament, the deceased was empowered to deal with his protected life interest and pursuant thereto by deed of resettlement executed in 1930 the property therein specified, including the policy of assurance was settled on such trusts as the deceased and his eldest son should jointly appoint but subject to certain declared trusts. The deceased again covenanted to pay the annual premiums.

In 1934, by virtue of powers conferred by the deed of resettlement, the deceased and his eldest son appointed part of the settled property, including the policy, to the son absolutely, with the result that the son became absolute beneficial owner of the policy.

Thereafter until the deceased's death in 1940 the son paid the annual premiums out of his own moneys.

Thirty-seven premiums in all were paid, of these, thirty-one were paid by the deceased, *viz.*, four prior to the date of the marriage settlement, twenty-three prior to the date of the resettlement and four thereafter.

The Crown claimed estate duty on the policy moneys under section 2 (1) (*c*) of the Finance Act, 1894, or alternatively under section 2 (1) (*d*) *ibid.*, as amended by section 30 (1) of the Finance Act, 1939.

Held, (1) That the donee referred to by section 11 of the Customs and Inland Revenue Act of 1889 is the ultimate beneficial owner of the policy in question, in this case the deceased's eldest son, and that prior to the appointment of 1934 the policy had not been kept up for *his* benefit.

As a consequence the claim under section 2 (1) (*c*) *supra*, failed.

(2) That the property assigned to the eldest son in 1934 was the policy of assurance and as the eldest son was the sole and absolute owner of the policy at the date of the deceased's death and had been for more than five years prior thereto no beneficial interest accrued or arose at the death; hence the claim under section 2 (1) (*d*) *supra*, failed.

(3) That the inclusion of property other than the policy in the 1934 appointment did not bring the case within the scope of section 30 (1) of the Finance Act, 1939 (apparently), on the grounds that the eldest son having power to deal with the policy as he saw fit, the proviso to subsection (1) of section 30 was applicable.

THE LIBRARY

Nathan's Equity Through the Cases. Second edition. By Dr. O. R. Marshall. London: Stevens & Sons, Ltd. 1951. 522 and lx pp. (£1 15s.)

The first edition of this book has proved very popular with students and the present edition should prove equally successful. The chief changes are several new cases on charities in the text (so that this subject takes up a large fraction of the book), and valuable learned notes on *Re Diplock,* [1948] Ch. 465, on trust investments and trustee-directors. The Diplock note is rather longer than the other comments but this seems to be justified by the importance of the point. The selection of cases is careful, the comments which follow them are keen and critical, without being speculative. The footnote references are extremely full, with welcome references to academic periodicals on both sides of the Atlantic. The present edition shows signs of great care and thought. The chief criticism of the book is its inappropriate title. It is mainly a Casebook on Trusts, and does not cover the whole of equity. Another criticism of arrangement is the treatment of unenforceable trusts under charitable trusts (p. 216) with only a cross-reference at p. 31, where it might have been dealt with more aptly. So far as the views advanced in the book are concerned, all are able, although differences of opinion exist on some of the points concerned. Thus *Brown* v. *Burdett* (1882), 21 Ch. D. 677 (p. 131) probably decides something quite different from what it is stated in all books on equity to decide, though the point is one of doubt. This illustrates the difficult fringe problems of property and equity. The equity lawyer is prepared to countenance "powers in the nature of a trust" (p. 27) and perpetuity rules applying to the duration of interests (p. 219) whereas the property lawyer tries to remove these anomalies by treating them as the implication of gifts in default of appointment, and the creation of powers to apply income, as separate gifts, respectively. The notes on *Re Brooker,* at p. 307, and on the *River Douglas Case,* at p. 514 are well done. One of the most interesting points in the book is the note on *Re Gardner* (1923), at p. 92. The rule that predecease of a beneficiary does not affect an interest in a secret trust operating behind a devise has recently been followed, since this book appeared. There may well be a difference between a will as passing the trust property to the trustee, and a will as delimiting the beneficial interest. The beneficiary takes under a trust which is constituted by the death of the testator, but his interest is not technically a devise or bequest by that testator. The criticism of the "equity" of the next-of-kin in the *Diplock Case* (p. 399), seems to be met by Lord Simonds' judgment in the House of Lords in that case, since this book was in the press.

A. K. R. K.

Jackson and Gosset's Investigation of Title. Sixth edition. By Edmond H. Bodkin, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1950. lxiv and 490 pp. (£2 10s.)

The fact that a new edition of this work has been called for in two years testifies to the utility of the last edition, which was the first really up-to-date edition since the 1925 legislation. This edition has had to take note of the new legislation on planning and agricultural holdings as well as the Landlord and Tenant (Rent Control) Act, 1949, and a variety of provisions in other statutes, and, of course, a number of recent decisions. Agricultural holdings (including the relevant provisions of the Agriculture Act, 1947) and the Town and Country Planning Act (including the statutory instruments issued under the Act) have been incorporated by two précis of the appropriate

sections coupled with requisitions, those on the latter Act being, in the opinion of the learned author, mainly concerned with preliminary enquiries before contract. The observations we made in reviewing the last edition, therefore, apply with greater force to the present edition, but subject to this the utility of this work to all conveyancers is obvious and the work should remain popular.

The Conveyancers' Year Book, 1949. By JAMES A. GIBSON, of Lincoln's Inn, Barrister-at-Law, assisted by C. N. BEATTIE and J. P. WIDGERY, of Lincoln's Inn, Barristers-at-Law. Vol. 10. London: Solicitors' Law Stationery Society. 1951. xl and 216 pp. (£1 17s. 6d.)

This volume appears rather more than a year after the date of the matter with which it deals. This is certainly a handicap, because one of the great advantages of such a work is to enable the conveyancer to check up on matters that are too recent to have received treatment in the standard works of reference. The learned Editor has also decided to abandon the policy of dealing with every decision having any bearing on the subject treated and to confine attention to more extensive treatment of matters of general interest, eliminating those decisions which are dependent upon their peculiar facts or are " just one more illustration of the application of some perfectly well-suited rule of law or construction ". With regard to the policy of ignoring decisions dependent upon peculiar facts there is much to be said for this new policy, but we are not so sure about the second head because the most recent authority can be helpful in a variety of ways. At the same time we are not prepared to condemn this view, though the process of selection is always difficult. Otherwise this volume follows the same character as its predecessors and provides valuable summaries and useful comments on a variety of topics, and one of its very valuable features is the notice of articles in periodicals, though in this respect it is far from complete and it is thought that it might be extended.

Lewin's Law of Trusts. Fifteenth edition. By RONALD COZENS-HARDY HORNE, of Balliol College, Oxford, and Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1950. clxxviii and 1010 pp. Together with Supplement to January 1, 1951, by B. K. SEARLE, Barrister-at-Law. (£5 5s.)

There are no major changes in this edition from that of the 1939 edition, which was radically edited, except the addition of a chapter on the liability of trustees for estate duty. This question has, of course, become of great importance which is increased by the Finance Act, 1950, dealt with in the Supplement. There have been a number of important decisions on the law of trusts which have been incorporated into the text, but despite the fact that there is now no modern book on charities this chapter has not received the attention which it deserved. For a variety of reasons the problem of charities is becoming of increasing importance, and we should like to see this chapter receive a radical overhaul and extended treatment. As the learned Editor points out in his Preface the law of trusts remains of great importance but of changing character owing to the necessarily different form that settlements are taking due to the incidence of taxation. A more radical treatment of the text would be helpful to those concerned with drafting the necessary clauses to give effect to the changed conditions. We, therefore, express the hope that in a later edition more attention may be devoted to recent developments even though this may involve a longer book. A slight alteration can be suggested in the elimination of the Trustee Act from an Appendix or else the omission from printing the relevant section of the Act *in extenso* in the text.